GRAYMAIL LEGISLATION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON LEGISLATION

OF THE

PERMANENT SELECT COMMITTEE ON INTELLIGENCE HOUSE OF REPRESENTATIVES

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TUESDAY, AUGUST 7, 1979

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON LEGISLATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:05 a.m., in room H–405, the Capitol, Hon. Morgan Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy, Mazzoli, and McClory.

Also Present: Thomas K. Latimer, staff director; Michael J. O'Neil, chief counsel; Bernard Raimo, Jr., counsel; Ira H. Goldman, counsel; Herbert Romerstein, professional staff member; and Louise Dreuth, secretary.

Mr. MURPHY. Good morning, ladies and gentlemen. Let me apologize for being a few minutes late. Evidently my staff thought I was on vacation and nobody was in my congressional office.

Today we begin a series of hearings to consider legislation dealing with the phenomenon called graymail. They stem directly from hearings earlier this year before this subcommittee on espionage laws and leaks. They will seek to resolve the problems associated with graymail, which is a term used to describe the dilemma facing the Government when a defendant claims that he must use classified information in defending himself. The Government then must choose between going forward with the prosecution, thereby compromising the classified material, or safeguarding the material but dropping the prosecution.

For a variety of reasons, the past few years have witnessed a significant increase in the number of criminal prosecutions in which the use or disclosure of classified information has become an issue. Such cases are not confined to any particular area of alleged illegal activity. Crimes charged have included espionage, perjury, narcotics distribution, burglary, and civil rights violations, among others.

Enforcement of the new overseas bribery statute will add to the list of such cases.

Whatever the charge, whenever classified information becomes involved the Government is likely to be faced with the disclose-or-dismiss dilemma, with what has become popularly known as graymail. Sometimes graymail is actively employed by an unscrupulous defendant who threatens to publicly reveal all kinds of sensitive information, even if it has no possible bearing on the issues of the case, if a prosecution is brought or continued. At other times the defendant seeks only to exercise his right to present to the jury admissible evidence that is relevant to a legitimate defense theory and which consists of classified information.

In either instance, all the Government can do is make an educated guess as to what classified information may be revealed during the trial, and then if it decides to proceed with the prosecution, sit back with its fingers crossed and hope that the actual information disclosed doesn't result in too much damage to the national security.

Such a situation is unacceptable. Both bills before the subcommittee, H.R. 4736, drafted by members of the subcommittee, and H.R. 4745, the administration proposal, are designed to eliminate the guesswork, surprise and fear from such a crucial decisionmaking process. They achieve this result primarily by requiring most of the judicial decisions regarding relevancy or admissibility of classified information to be made prior to trial, and by authorizing the court in certain limited circumstances, to order that relevant classified information be admitted in a sanitized form.

I wish to emphasize that neither bill is designed to allow the withholding from the defendant of any relevant admissible evidence. A state secrets privilege is not being introduced into the criminal law. It should also be noted that although the subcommittee and the administration have worked together closely and productively in drafting these bills, there are a few issues of which we could not agree. Therefore, though substantially similar, the two bills contain a limited number of significant differences.

I am confident that these differences concerning the Jencks Act, the timing of the Government's argument on the national security significance of the information at issue, and the reciprocity section, amongst others, will be resolved as the legislative process continues.

I am looking forward to that process and to a continuation of the productive working relationship that has developed among the House and the Justice Department in our deliberations on this legislation.

In closing, I would like to thank the members of the subcommittee who have joined in sponsorship of this bill. Mr. McClory, my colleague from Illinois, the ranking minority member of the subcommittee, has contributed significantly to its development, as has our colleague on the subcommittee, Mr. Mazzoli of Kentucky. While we are not in full agreement on every provision, we are all committed to continue working together closely to produce a fair and effective procedural mechanism for dealing with the use of classified information in criminal trials.

I would also like, before turning it over to Mr. McClory for his statement, to thank him for appearing today, and taking the time from his busy schedule. I know you wanted to be back in your district working, and I thank my colleague for being here.

Mr. McCLORY. Well, Mr. Chairman, I can't think of a more important place to be than right here, and working with you today on this very crucial problem with which the Congress must deal, it seems to me, directly. And I am pleased that you have moved quickly to schedule hearings to consider legislation to deal with the so-called graymail problem. It was less than a month ago that Congressman Mazzoli and you and I joined in announcing the introduction of the Classified Information Criminal Trial Procedures Act, as it is called.

Mr. Chairman, I also appreciate the efforts of our first witness this morning, Phillip Heymann, Assistant Attorney General in charge of

the Criminal Division, in working with the committee on what has become H.R. 4736. This spirit of cooperation that he has demonstrated is to be commended.

It is important to recognize, however, that a few significant differences in approach are suggested by a comparison of that bill and H.R. 4745, the administration's proposal. In this regard, I am glad that the chairman of the Judiciary Committee, Congressman Peter Rodino, chose to introduce that bill so that we might have before us, in black and white, two distinct approaches which have been suggested to meet an admitted problem.

The situation as it exists today—when classified information is relevant to a criminal proceeding—has few, if any guidelines. This is unfair to the Government which must investigate and prosecute allegations of criminal wrongdoing; this is unfair to the defendant, who has little, if any, opportunity to discover prior to the actual trial the exact nature and sensitivity of information which might be relevant to his defense; and this is unfair to the public, to whom we owe a duty and to which the Executive owes a duty to provide a fair equal administration of justice.

As with many legislative problems, the definition of the goal is simple; the hard part is mapping the route which must be traveled to get there. Here the goal is to reduce the uncertainties inherent in a case in which classified information may be relevant, without providing an unfair tactical advantage to either party.

If any of the new rules being proposed would place a burden on either party which was previously nonexistent, I do not believe that this by itself is a reason to dismiss it or to provide some sort of reciprocity or compensation to that party. It is an unfortunate fact of the circumstances that a proceeding involving classified information must be set apart from all other criminal procedures. But the record of Senator Biden's investigation in the Senate, and of our own investigation, as set out in hearings held this past January, indicates that this is nevertheless necessary.

However, if on top of any new burden it is shown that a particular contemplated rule would do injury to a party, this committee must seek to require that the other party provide reciprocity targeted specificially to undo that damage. This, indeed, is what we can appropriately call reciprocity.

Finally, if no provision for such fair reciprocity can be devised, as a matter of constitutional law, policy, and fairness, the committee may be faced with the proposition of rejecting such a proposed rule.

I thank you, Mr. Chairman, for allowing me to make these few remarks. I certainly want to join with you in welcoming our witnesses here this morning, and I look forward to the hearings that we are undertaking at this time.

Mr. MURPHY. Thank you, Mr. McClory.

Now, ladies and gentlemen, let me welcome our opening witness this morning, Mr. Philip Heymann, the Assistant Attorney General for the Criminal Division. Mr. Heymann came to the Department after a distinguished career, most recently as a professor of law at the Harvard Law School. He has led the Government's effort in drafting this legislation, and is most responsible for its reasoned and well-balanced approach.

Mr. Heymann, we welcome you. Please proceed with your statement.
[The prepared statement of Mr. Philip B. Heymann follows:]

STATEMENT OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

Mr. Chairman, and members of the committee, I am pleased to be here today to discuss the various legislative proposals that have been introduced in response to the problems posed by classified information in criminal cases. There are two bills before this subcommittee H.R. 4736, introduced by Congressman Murphy and co-sponsored by several members of this subcommittee, and H.R. 4745, an Administration bill introduced by the chairman of the House Judiciary Committee, Congressman Rodino. In addition, Senator Biden, chairman of the Rights of Americans Subcommittee of the Senate Intelligence Committee, has also introduced legislation, S. 1482, addressing this problem.

At the outset, I want to commend the chairman as well as Congressman Mazzoli and Congressman McClory and the committee staff for their diligent and constructive efforts to address what has come to be known as the "graymail" problem. Following Senator Biden's pioneering efforts last year, this committee held hearings in January that focused additional attention on the need to improve procedures for criminal cases involving classified information. Since that time, the committee and its staff along with Senator Biden, the Justice Department, and the ACLU have worked to devise legislation that would provide needed procedures for these troublesome cases.

As the chairman and I both noted in announcing the introduction of the various bills on July 11, some important differences in approach remain to be resolved. I am pleased that the committee has acted expeditiously in calling these hearings so that we may begin to explore the remaining areas of disagreement and move forward with this legislation.

My testimony today will touch upon three major areas. First, I will briefly discuss the problems we currently face in criminal cases involving national security information and the reasons why I believe there is a need for legislation to solve those problems. Second, I will describe the approach taken in the administration's proposal, H.R. 4745, and explain the basis for its various provisions and the important improvements they would produce. Third and finally I will discuss what I see as the major differences between H.R. 4736 and H.R. 4745.

THE "GRAYMAIL" PROBLEM

Two of the most important responsibilities of the Executive are the prosecution of violations of federal criminal laws and the protection of our national security secrets Under present procedures these responsibilities far too often conflict forcing the government to choose between accepting the damage resulting from disclosure of sensitive national defense information and jeopardizing or abandoning the prosecution of criminal violations. The government's understandable reluctance to compromise national security information invites defendants and their counsel to press for the release of sensitive classified information the threatened disclosure of which might force the government to drop the prosecution "Graymail" is the label that has been applied to describe this tactic It would be a mistake, however, to view the "graymail" problem as limited to instances of unscrupulous or questionable conduct by defendants since wholly proper defense attempts to obtain or disclose classified information may present the government with the same "disclose or dismiss" dilemma.

To fully understand the problem, it is necessary to examine the decision making process in criminal cases involving classified information. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally made as they arise during the course of the trial. In advance of trial, the government often must guess whether the defendant will seek to disclose certain classified information and speculate whether it will be found admissible if objected to at trial. In addition, there is a question whether material will be disclosed at trial and the damage inflicted before a ruling on the use of the information can be obtained. The situation is further complicated in cases where the government expects to disclose some classified items in presenting its case. Without a procedure for pretrial rulings on the disclosure of classified information, the deck is stacked against proceeding with these cases because all of the

sensitive items that might be disclosed at trial must be weighed in assessing whether the prosecution is sufficiently important to incur the national security risks.

In the past, the government has foregone prosecution of conduct it believed to violate criminal laws in order to avoid compromising national security information. The costs of such decisions go beyond the failure to redress particular instances of illegal conduct. Such determinations foster the perception that government officials and private persons with access to military or technological secrets have a broad de facto immunity from prosecution for a variety of crimes. This perception not only undermines the public's confidence in the fair administration of criminal justice but it also promotes concern that there is no effective check against improper conduct by members of our intelligence agencies.

While only a very small percentage of criminal cases present classified information questions, these cases often involve important matters of considerable public interest. Moreover, as the Chairman has previously noted, we are increasingly confronting classified information issues in a wide range of cases including espionage, perjury, burglary, and civil rights violations, among others. The new Foreign Corrupt Practices Act provisions and the possible enactment of a charter for intelligence activities can be expected to expand the number of cases presenting classified information problems.

The Justice Department has recently endeavored to resolve problems posed by issues involving classified information as they arose in individual cases. Our experience with such an ad hoc approach has convinced us of the need for a legislative response to the graymail problem. Only by establishing a uniform set of procedures for resolving classified information issues prior to trial can the speculation and irrationality be removed from the present system. Rather than making a rough and poorly informed guess as to the national security costs of a prosecution, the government under the procedures contained in H.R. 4736 and H.R. 4745 would be able to determine whether in fact there was an actual conflict between its prosecution and national security responsibilities and, if there was, to make an informed assessment of the costs of continuing the prosecution. While it is not possible to eliminate the tension between the Executive's prosecutorial responsibilities and its duty to guard against disclosure of classified information, I believe that the procedures contained in both bills would significantly enhance the government's ability to discharge these responsibilities without jeopardizing the defendant's right to a fair trial.

THE ADMINISTRATION'S PROPOSAL

1. Overview

The Administration bill, H.R. 4745, addresses a wide range of procedural issues involving classified information that may arise at various stages of a criminal case. We have atttempted to devise procedures that will deal with specific problem areas that have been encountered in past cases and to provide guidance that will promote uniformity and predictability in the handling of classified information issues by district judges.

Key provisions of H.R. 4745 would create a procedure for pretrial rulings and appeals on whether classified information may be disclosed by the defendant at pretrial or trial proceedings. These provisions would prevent the premature and unnecessary abandonment of prosecutions in the face of "graymail" threats by enabling the government to obtain court orders barring the disclosure of inadmissible classified information. When classified information is determined by the court to be admissible, the bill provides that alternatives to disclosure of the specific classified items and measures other than dismissal be employed where such steps are compatible with the defendant's right to a fair trial. In addition, by authorizing the government to take interlocutory appeals the bill would redress the present situation in which the government, when faced with a questionable district court ruling, must either compromise the national security information by permitting its disclosure at trial or withhold the information and jeopardize the prosecution.

Other important issues addressed in the Administration bill include the early establishment of timetable for resolving issues involving classified information in criminal cases: the requirement of appropriate protective orders to safeguard classified materials disclosed to defendants pursuant to discovery requests, due process requirements or other obligations of the government; the provision of guidance regarding the use of alternatives to the disclosure of classified information to the defendant; procedures related to the introduction and proof of classi-

fied matters at trial; the establishment of security procedures for the safekeeping of classified information submitted to the federal district and appellate courts; and a limited modification of the government's Jencks Act obligations in order to avoid undue interference with the government's ability to prosecute cases dealing with classified information.

It is important to note that the bill would require only modest procedural changes in the manner in which criminal cases involving classified information are conducted. The primary effect of the bill would be to alter the timing of rulings on the relevance and admissibility of certain evidence. As will be noted below, the major features of the Administration bill are rooted in statutory provisions and procedural rules that now apply to the conduct of criminal cases. Moreover, the bill reflects our desire to preserve the important values served by public trials in criminal cases. There are no provisions that would authorize the exclusion of the public or the press during the taking of any testimony at a criminal trial.

2. Discussion of individual provisions

a. *Section 1. Title.*—This section entitles the bill the "Classified Information Procedures Act."

b. *Section 2. Definitions.*—This section defines the terms "classified information" and "national security" for purposes of the bill. These definitions determine the scope of the information subject to the procedures contained in the bill. The definition of "classified information" in subsection (a) is intended to encompass all information determined pursuant to executive order, statute, or regulation to require protection for reasons of national security. In order to avoid any uncertainty, "restricted data," as defined in the Atomic Energy Act of 1954, is specifically included within the definition of "classified information." Subsection (a) is written in general terms so as to encompass both the present executive order governing classified information (Executive Order 12065) and any executive orders, statutes, or regulations supplementing or superseding the present executive order. The definition of "national security" in subsection (b) tracks the definition of that term in Executive Order 12065.

c. *Section 3. Pretrial conference.*—This section adapts the general pretrial conference provision of Rule 17.1 of the Federal Rules of Criminal Procedure to the particular context of criminal cases involving classified information. The procedure established by this section will enable either party to secure a pretrial conference early in the case to set appropriate timetables for the resolution of issues involving classified information. This procedural mechanism should afford the parties and the court adequate opportunity to address the often complex and sensitive questions presented in criminal cases involving classified information.

d. *Section 4. Disclosure of classified information to defendants.*—This section includes provisions governing the disclosure of classified information to defendants in connection with criminal cases. Subsection (a) requires that the court, upon the request of the government, enter an appropriate order to protect against the compromise of classified information disclosed to the defendant. At present, Rule 16(d)(1) of the Federal Rules of Criminal Procedure authorizes the court to enter appropriate protective orders in connection with the discovery process. In addition, subsection (a) calls upon the court to issue suitable protective orders in connection with disclosures made by the government other than pursuant to the discovery process. The subsection also provides important guidance regarding the protective measures that may be utilized by the courts by specifying seven types of provisions that would normally be appropriate to safeguard against the compromise of classified information disclosed to defendants. It is contemplated that the defendant would be provided with an opportunity for a hearing on the particulars of the protective order.

Subsection (b) provides that, upon the motion of the government, alternatives to disclosure of the specific classified information are to be employed where the classified information itself is not necessary to enable the defendant to prepare for trial. Rule 16(d)(1) of the Federal Rules of Criminal Procedure presently provides that "[u]pon a sufficient showing the court may at any time order that the discovery * * * be denied, restricted, or deferred or make such other order as is appropriate." Subsection (b) is intended to supplement Rule 16(d)(1) by providing guidance to the court as to the alternatives to be employed when disclosure of the specific classified information to the defendant

is not necessary. These alternatives include the deletion of specific items of information, the use of a portion or summary of the information, and the substitution of a statement admitting relevant facts. The procedure provided in subsection (b) is intended both to permit prosecutions to be continued where an order requiring that the specific classified information be disclosed to the defendant would prompt the government to dismiss the case and to protect against the unnecessary disclosure of classified information. The defendant's interests are protected since the subsection may not be used to withhold any classified information necessary to enable the defendant to prepare for trial. As under present Rule 16 (d)(1), the bill provides that the government may demonstrate that the use of such alternatives is warranted in an *in camera* submission to the court alone. Subsection (b)(2) insures that the defendant will be able to obtain appellate review if information is withheld pursuant to subsection (b)(1).

As indicated above, subsection (b) serves to provide guidance regarding permissible alternatives to disclosure of classified information sought by defendants in the discovery process. It should be noted that the Administration's proposal is considerably more modest than the approach endorsed by the American Bar Association on the discovery of classified information. The ABA's most recent standards for discovery and disclosure prior to trial provide that "[d]isclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe the constitutional rights of the accused." American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Standard 11–2.6(c) (August 1978).

e. *Section 5. Notice of defendant's intention to disclose classified information.*—This section requires the defendant to notify the court and the government of classified information the defendant expects to disclose either at trial or at any pretrial proceeding. The Defendant's duty to provide such notice extends to all documents or testimony that he knows or has reason to believe contain classified information. The defendant is required to provide a brief description of all such classified information within the time specified by the court. This description need not indicate the relationship of the information to the defense or the method by which the defendant intends to develop the information at the pretrial or trial proceeding. The defendant has a continuing duty throughout the case to notify the government of additional classified information that he expects to disclose. Subsection (b) provides that the court may respond to violations of the notice requirement by prohibiting the defendant from utilizing the classified information at pretrial or trial proceedings.

The notice requirement is similar to the requirement adopted by Congress last year to deal with sensitive information regarding the victim's prior sexual behavior in rape cases. The rape evidence statute created new Rule 412 of the Federal Rules of Evidence. That rule requires the defendant to provide written notice fifteen days prior to trial of any evidence of specific instances of the alleged victim's prior sexual behavior which the defendant intends to offer at trial. The purpose of the notice requirement in rape cases, like the purpose of the notice requirement in section 5 of H.R. 4745, is to identify cases in which there is a need to hold a pretrial *in camera* hearing to determine whether sensitive information may be disclosed by the defendant at trial. The Federal Rules of Criminal Procedure also contain other notice requirements. Rule 12.1 presently requires the defendant to provide the government with a written notice of his intention to offer an alibit defense and to disclose the names and addresses of the witnesses upon whom he intends to rely to establish the alibi. Rule 12.2 now requires the defendant to notify the government in writing of his intention to rely upon the defense of insanity at the time of the alleged crime.

The notice requirement of section 5 is the initial step in the procedure created by the bill for predisclosure rulings regarding the relevance and admissibility of classified information. Notice from the defendant of the information he intends to disclose is essential to alert the government to the nature of the information the defendant will seek to reveal and to enable the government to evaluate whether it needs to obtain a predisclosure ruling regarding the information. Consistent with the purpose of the notice requirement, subsection (a) provides that, upon request, the court shall order that the classified information identified in the defendant's notice not be disclosed until the government has been afforded a reasonable opportunity to obtain a predisclosure ruling pursuant to the procedures established by section 6 of the Act.

f. *Section 6. In camera procedure for cases involving classified information.*—This section provides a procedure for obtaining predisclosure rulings on the relevance and admissibility of classified information in criminal cases. The *in camera* hearing procedure is similar to the *in camera* procedure enacted by Congress last year for pretrial hearings concerning the victim's past sexual behavior in rape cases. See Rule 412 (c), Federal Rules of Evidence.

The purpose of the section 6 procedure is to prevent the unnecessary abandonment of prosecutions by making it possible for the government to secure court orders barring the disclosure of classified information that is not relevant, material, and otherwise admissible and to ascertain whether alternatives to disclosure of the specific information or measures other than dismissal of the prosecution are available for classified information that is relevant, material, and admissible. The procedure is also intended to equip the government to make an informed assessment prior to trial of the national security costs of continuing the prosecution as well as the risk to its prosecution interests of protecting national security by refusing to permit the disclosure of classified information.

Subsection (a) provides that the government may move for an *in camera* proceeding concerning the use of any classified information at trial or any pretrial proceeding. The government's motion is to be made within the time specified by the court, but upon a showing of good cause the court may permit the government thereafter to move for an initial or additional *in camera* proceeding. The government may choose not to seek a ruling regarding some or all of the information identified by the defendant in its notice under section 5 or may request a hearing on information that has not been included in the defendant's notice.

Subsection (b) establishes a threshold requirement that must be satisfied by the government in order to obtain an *in camera* proceeding. First, the government must provide the court with the specific classified information as to which the government desires a predisclosure ruling. Second, the government must demonstrate that the information is properly classifiable under the standard of the applicable executive order, statute or regulation. The provision of the information to the court and the demonstration of the harm from disclosure are to be made by the government *ex parte* in an *in camera* proceeding. The threshold requirement established by subsection (b) will serve as a judicial check to insure that the *in camera* proceeding described in subsection (c) is utilized only when the government is seeking to prevent the compromise of sensitive national security information, information that meets the standard for classification.

Subsection (c) sets forth the procedures to be followed in connection with the *in camera* proceeding. Prior to the proceeding, the government is required to provide the defendant with notice of the information that will be at issue in the proceeding. Where the government has previously provided the defendant with specific classified information in connection with pretrial proceedings, the government would simply identify the specific information in its notice to the defendant.

In other circumstances, however, the government would have the option of identifying the specific information or describing the information by generic category. The generic category approach (which might include a category such as "the identity of CIA agents") might be used instead of specific names of agents in situations where the defendant may not know the particular information of concern to the government or may be uncertain of its accuracy. The generic descriptions proposed by the government would be subject to review by the court in order to assure that they were appropriate to describe the specific classified information of concern to the government. Where the generic category approach is employed in the notice, the defendant would proffer any information coming within the category that he intended to disclose at a pretrial or trial proceeding and the government would not be required to confirm or deny the accuracy of the proffered information. Subsection (c)(1) requires that the court rule on the information at issue prior to the commencement of the relevant proceeding when the government's motion is filed in advance of the proceeding.

Following briefing and argument by the parties to the court *in camera*, the court shall determine whether the specific classified information identified by the government or any information proffered by the defendant as coming within the government's generic categories is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. As used in this section, "material" means more than that the evidence in ques-

tion bears some abstract logical relationship to the issues in the case. It requires that the evidence be of significance to the defendant's case. The "relevant and material" standard is patterned on the standard adopted by the Supreme Court for determining whether the government must reveal the identity of an informant to the defendant in a criminal case. *See Roviaro* v. *United States*, 353 U.S. 53 (1957). As in the informant situation, the significant government interest in nondisclosure requires that a more demanding standard than relevance be employed. In the recent rape evidence legislation referred to previously, Congress also determined that a higher standard than relevance was required in view of the sensitive nature of the information involved. In that context, Congress required not only that the evidence of the victim's past sexual behavior be "relevant" but also "that the probative value of such evidence outweighs the danger of unfair prejudice." Rule 412 (c)(3), Federal Rules of Evidence. The administration bill does not require or permit the value of the evidence to the defendant to be weighed against the harm of disclosure to the national security. Instead, it takes the more modest approach of requiring that the court determine that classified information is both "relevant and material" before it may be disclosed in a criminal case.

Subsection (c)(2) provides that the information at issue in the *in camera* proceeding shall not be disclosed at the pretrial or trial proceeding unless the court determines that the information is relevant, material, and otherwise admissible. The subsection requires the court to make a specific, written determination in order to facilitate appellate review. In setting forth its determination, the court should identify the specific elements of the offense or theories of affirmative defense to which the information is found to be relevant and material. Subsection (c)(3) provides that if the information is determined to be relevant, material, and admissible or if the government does not elect to contest those issues, the government may proffer a statement admitting the relevant facts such information would tend to prove or submit a portion or summary of the statement. The subsection requires that the proffered alternative be used by the defendant in lieu of the classified information unless the court finds that use of the classified information itself is necessary to afford the defendant a fair trial. This provision is intended to permit the government to continue prosecutions and avoid disclosure of sensitive national security information while assuring that the defendant will be able to use any classified material necessary to afford him a fair trial. Subsection (c)(4) provides a range of possible judicial responses to be employed where the court finds that the proffered alternatives to disclosure may not be used and the government continues to object to disclosure. The court is afforded broad discretion to fashion an appropriate response in such circumstances. It is contemplated that orders under subsections (c)(3) and (c)(4) will be entered only after opportunity for a hearing on the issues presented.

Finally, subsection (c)(4) provides that the government may exercise its right to take an interlocutory appeal prior to the effect of any order issued under the subsection and, if such an appeal is unsuccessful, may avoid the sanction that would be imposed by electing to permit the defendant to disclose the information. This provision is intended both to minimize the number of interlocutory appeals and, more importantly, to enable the government to make the critical "disclose or dismiss" decision with a full understanding of the costs involved.

g. *Section 7. Interlocutory appeal.*—This section would authorize the government to take interlocutory appeals from adverse district court orders relating to the disclosure of classified information. At present, the government is powerless to appeal such orders and therefore is unable to obtain appellate review of important district court rulings. Instead, the government must either compromise the national security information by permitting its disclosure during the course of the prosecution or withhold the information and jeopardize the prosecution. Congress has empowered the United States to appeal orders of a district court suppressing or excluding evidence in a criminal case where the United States Attorney certifies that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding. See 18 U.S.C. 3731. Authorization of interlocutory appeals of orders requiring the disclosure of classified information is warranted since such orders generally have even a more dramatic impact on a prosecution than suppression rulings. This section limits the government's interlocutory appeal rights to those situations where the Attorney General, Deputy Attorney General, or designated Assistant Attorney

General certifies to the district court that the appeal is not taken for purposes of delay.

The provision requires that interlocutory appeals be expedited by the courts of appeals in order to protect the defendant's interest in a speedy trial. While it is expected that most issues will be resolved by rulings prior to trial and thus that most interlocutory appeals will be taken prior to trial, the section permits interlocutory appeals to be taken during trial and contains provisions to insure that such appeals will be resolved quickly to avoid disruption of the trial. The procedures for interlocutory appeals during trial are patterned closely on provisions of the District of Columbia Code adopted by Congress in 1970. See D.C. Code § 23–104.

h. *Section 8. Introduction of classified information.*—This section addresses various issues related to the disclosure of classified information in a pretrial or trial proceeding. Subsection (a) provides that documentary materials need not be declassified in order to be placed into evidence. It reflects the view that declassification is an executive rather than a judicial function. Subsection (b) permits the use of redacted documents (documents with certain portions excised or deleted) or the use of portions of documentary materials instead of requiring that the entire document be introduced into evidence. Subsection (c) authorizes the court to permit proof of the contents of a document without introducing the document itself into evidence. These procedures will avoid unnecessary disclosure of sensitive national security information. Subsection (d) provides a procedure to address the problem presented during a pretrial or trial proceeding when the defendant poses a question or embarks on a line of inquiry that would require the witness to disclose classified information. This provision serves in effect as a supplement to the *in camera* proceeding provisions in Section 6 to cope with situations that cannot be handled effectively under that section.

i. *Section 9. Security procedures to safeguard against compromise of classified information disclosed to the court.*—This section addresses the need for the development of adequate procedures to protect against the compromise of classified information submitted to the federal courts. Such information may be disclosed in original documents submitted to the court, in briefs and pleadings, during oral arguments, or through testimony. At present, the handling of such materials is often the subject of *ad hoc* arrangements developed in each case. Section 9, which is modeled on section 103(c) of the Foreign Intelligence Surveillance Act of 1978, calls for the formulation of uniform security procedures for the protection of classified information submitted to the federal courts.

j. *Section 10. Jencks Act exception for classified information.*—This section would amend the Jencks Act, 18 U.S.C. 3500, to provide a limited exception to its disclosure requirements. The Jencks Act is intended to assist the defendant in impeaching the testimony of government witnesses by requiring that prior statements of a government witness regarding the subject matter of his testimony be provided to the defendant. At present, the Jencks Act contains a provision permitting the court, upon the motion of the United States, to determine in an *in camera* proceeding whether certain aspects of the witness' statement should be excised as unrelated to the subject matter of the witness' testimony and withheld from the defendant. Section 10 of the bill would add an additional exception covering those aspects of a witness' statement that are found by the court to be both properly classifiable and consistent with the witness' testimony. Without this provision, the government may have to forgo the use of an important witness, drop a prosecution entirely, or compromise sensitive national security information the disclosure of which will not further the purpose of the Jencks Act to assist the defendant by providing material useful for impeachment.

MAJOR DIFFERENCES BETWEEN H.R. 4736 AND 4745

In focusing on several important differences between Congressman Murphy's bill, H.R. 4736, and the administration bill, H.R. 4745, I do not want to create the erroneous impression that the differences outnumber or overshadow the similarities and advantages offered by both bills. I am firmly convinced that both of these bills would be a substantial improvement over the status quo. My emphasis on the remaining differences in approach is intended to urge the Committee to resolve these differences in a manner that I believe will enhance the effectiveness of the legislation. I shall focus on what I view as substantive differences rather than technical or drafting issues.

1. Specification of the standard governing the disclosure of classified information

The Murphy bill, section 102, is silent as to the standard to be applied by the district court in determining whether classified information subject to the bill's notice and hearing procedures may be disclosed by the defendant at trial. By contrast, the administration bill, section 6(c)(2), specifies that the classified information subject to the hearing procedures may not be disclosed unless "the information is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."

I believe that the approach taken in the Admnistration bill is clearly preferable. It serves what I believe to be the basic purpose of the various legislative proposals that have been introduced in response to the graymail problem—to provide guidance, to promote uniformity and predictability, and to facilitate decisions on the merits in cases involving classified information through procedures compatible with the defendant's right to a fair trial. As explained in my previous discussion of the administration bill, the "relevant and material" standard is based on the standard adopted by the Supreme Court in *Roviaro* v. *United States*, 353 U.S. 53 (1957), for determining whether the defendant is entitled to obtain and disclose the identity of a government informant in a criminal case. Noting the important "public interest in effective law enforcement" served by the protection of the identity of informants, the Court in *Roviaro* ruled that disclosure of such sensitive information is not required unless the information "is relevant and helpful to the defense of an accused or is essential to a fair determination of a cause." 353 U.S. at 59, 60–61).

Since the public interest in protecting the confidentiality of classified information is at least as substantial as the interest in protecting the identities of law enforcement informants, the *Roviaro* decision demonstrates that a more demanding standard than relevance should be employed to govern the disclosure of classified information. In enacting the recent rape evidence rule, Congress recognized that a higher standard than relevance was warranted in determining whether the victim's past sexual behavior could be disclosed at trial. There, Congress required that the usefulness of the information to the accused be balanced against the prejudice that would be caused by disclosure of the information. The "relevant and material" standard of the administration bill would eschew such a balancing approach which could preclude the accused from disclosing evidence important to his defense and would merely require that the classified information be significant to the defense of the case in order to be disclosable at trial.

2. Jencks Act modification

Section 10 of the administration bill would amend the Jencks Act (18 U.S.C. 3500) to provide a limited exception to its disclosure requirements. The Murphy bill contains no comparable amendment and thus would leave the Jencks Act as it now stands.

Absent the inclusion of a provision such as section 10 of H.R. 4745 or section 10 of Senator Biden's bill (S. 1482), the government may be needlessly forced to forgo the use of an important witness, drop a prosecution entirely, or compromise sensitive national security information. The following hypothetical illustrates the problem that may arise under the Jencks Act. Suppose a government agent who witnessed the transfer of a highly classified document to a member of a hostile foreign intelligence service prepared a statement describing the events and in this statement noted that the person receiving the document was the superior of a CIA agent who the United States had planted in the foreign intelligence service. Under the Jencks Act, the United States presently would be required to choose between desclosing the existence of the CIA agent to the defendant (another agent of the foreign intelligence service or a person cooperating with that organization) or not calling the eyewitness to the transfer of the document who is critical to the successful prosecution of the case.

The provisions in the administration bill and the Senate bill would prevent such situations without undercutting the important purpose served by the Jencks Act. The Jencks Act is intended to assist the defendant in impeaching the testimony of government witnesses by requiring that prior statements of a witness regarding the subject matter of his testimony be provided to the defendant. At present, the Jencks Act contains a provision permitting the court, upon the motion of the United States, to determine in an *in camera* proceeding whether certain aspects of the witness' statement should be excised as unrelated to the subject

matter of the witness' testimony and withheld from the defendant. Section 10 of H.R. 4745 would add an additional exception covering those aspects of a witness' statement that are found by the court to be both properly classifiable and consistent with the witness' testimony. The defendant thus would not be deprived by H.R. 4745 of any material useful for impeachment.

Under the Murphy bill, the government would be forced to make disclosure of highly clasified material in a witness' statement despite the fact that the classified items—names of CIA agents or characteristics of weapons systems—consisted of details that were wholly consistent with the witness' testimony and useless for impeachment. Moreover, the disclosure of such information would serve absolutely no purpose since the Murphy bill would require notice and a hearing before the defendant could disclose the classified material contained in the witness' statement at trial. Any material that the trial judge would permit to be excised as consistent with the testimony of the government witness would presumably be found nondisclosable by the judge under the bill's predisclosure hearing procedures.

3. Bill of particulars and reciprocity provision

The Murphy bill, in section 107, contains two requirements that are not included in the administration bill. First, section 107(c) requires that whenever the government requests a pretrial proceeding it must provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pretrial proceeding. Second, section 107(a) requires that, where the court determines under the hearing procedures of the bill that classified information may be disclosed by the defendant, the government must provide the defendant with "the information it expects to use to rebut" the classified information and "the identity of any witness it expects to use to rebut the particular classified information." Apart from the other problems presented by these provisions, I am concerned that they will serve to undermine the basic purpose of the legislation by providing defendants with additional incentives to press for the disclosure of classified information.

I question the need for the bill of particulars section. Rule 7(f) of the Federal Rules of Criminal Procedure now permits the defendant to seek a bill of particulars in any federal criminal case. Whether a bill of particulars is appropriate depends on the nature of the indictment or information filed by the government and the circumstances of the particular case. The defendant will have an opportunity to move for a bill of particulars under Rule 7(f) prior to being required to notify the government of classified information he intends to disclose at trial. There is no reason to require a bill of particulars at a later stage since a suitable bill of particulars will already have been provided or will have been found to be inappropriate by the district judge. At a minimum, if the provision is retained, it should be amended to make clear that the court will supervise the process applying the standards of the current rule and will determine the adequacy of the particulars provided by the government.

I also question the need for and the desirability of the requirement that rebuttal evidence and witnesses be provided to the defendant whenever classified information is found admissible under the predisclosure hearing procedures. There is, in my view, no legal requirement that such a provision accompany the type of pretrial notice and hearing procedures contained in the various graymail bills. The Supreme Court has ruled in the alibi notice context that due process requires that if the defendant is compelled to give advance notice of his intention to present an alibi defense the government must provide the defendant with advanced notice of its refutation of the alibi defense. *Wardius* v. *Oregon*, 412 U.S. 470 (1973). In *Wardius*, however, the Court was addressing a procedural rule designed to prevent surprise and to maximize the amount of information available to prepare for trial. In that context, the Court concluded that it was unfair to require only one party to make disclosure. The various classified information bills are not intended to enhance discovery of information to facilitate preparation for trial but are designed to provide procedures for orderly pretrial determination of issues involving the use of classified information at trial. In this respect, the bills before this committee are comparable to the rape evidence legislation and are unlike the alibi notice rule. In the rape evidence legislation adopted by Congress last year, there is no requirement that the government disclose its rebuttal evidence or that it provide a bill of particulars. That precedent should be followed here. Moreover, even if there were a legal

need for some form of rebuttal evidence provision, there would be no reason for the disclosure of the identity of government witnesses since the bill does not require the defendant to identify his witnesses in the pretrial hearing process.

I am also concerned about the rebuttal evidence provision as a matter of policy. In view of the substantial discovery rights of defendants in criminal cases, I question whether there is a need for additional disclosures mandated as part of this bill. It should be noted that most of the classified information that will be at issue in the pretrial hearing process will have been provided to the defendant by the government as part of the discovery process. In addition, in contrast to the alibi situation, it is not clear what is covered by the requirement that "the United States provide the defendant with the information it expects to use to rebut the particular classified information at issue." Unless the trial judge is provided with discretion to guide the government as to the scope of its obligations or the sanction for non-disclosure is modified to exclude good faith mistakes as to whether material should be considered to be "rebuttal evidence," I believe that the provision may spawn troublesome and disruptive litigation. Finally, if the witness disclosure aspect of section 107 is retained, it should be modified to authorize the court to permit the withholding of names in unusual situations where there is reason to believe that such disclosure would endanger the witness.

4. Initiation of the pretrial hearing process

The administration bill and the Murphy bill take different approaches to the initiation of the pretrial hearing process. Section 6(b) of the administration bill requires the government to demonstrate to the district judge that the information meets the applicable standards for classification. Section 102 of the Murphy bill, by contrast, requires only that the Attorney General, Deputy Attorney General, or a designated Assistant Attorney General make a written request for a hearing. Under both bills, the classified information of concern to the government would be disclosed to the court prior to the pretrial hearing.

I believe that the approach adopted by the administration bill provides an important additional assurance that the hearing procedures are employed only when sensitive national security material is actually involved. While I recognize that there is a concern that disclosure of the basis for the classification might prejudice the admissibility determination, this concern is met in the administration bill by the establishment of a standard that does not call upon the judge to balance the sensitivity of the classified information against the importance of the information to the defense.

5. Introduction of classified information

Section 8 of the administration bill contains three provisions governing the introduction and proof of the contents of classified documents at trial that are not present in the Murphy bill. These provisions would serve to protect unnecessary disclosure of classified information at trial without undercutting the rights of criminal defendants. The most important of these provisions, subsection 8(b), would authorize the court to prevent unnecessary disclosure of classified information by permitting the use of only a portion of a classified document or the excision of some or all of the classified information from a writing, recording, or photograph introduced in a criminal case. In the recent espionage prosecution in the *Kampiles* case, the government introduced into evidence a copy of a highly classified manual with certain extremely sensitive items deleted. This step, which was taken with the consent of the defendant, protected the material from unnecessary exposure. Section 8(b) of the Administration bill would permit the court, over the objection of the defendant, to order that this approach be followed in future cases. The effect of the provision would be to protect the most sensitive aspects of classified documents—aspects that the government would otherwise avoid revealing in presenting its case at trial. The defendant's rights would be protected since the court would hear any arguments the defendant chose to offer against permitting the deletions and the defendant would be free to demonstrate that the deleted portions should be disclosed as a relevant and material part of his defense.

Subsection 8(c) would also serve to avoid unnecessary disclosure of classified information. This provision would permit the government to prove the contents of a classified writing, recording, or photograph without introducing the original or a duplicate into evidence. By relying on secondary evidence such as testimony to prove matters contained in the writing, recording or photograph, the dis-

closure of classified information could be minimized. Absent the enactment of subsection 8(c) the best evidence rule (Rule 1002 of the Federal Rules of Evidence) would appear to preclude this approach. While subsections 8(b) and 8(c) serve similar purposes, they are not redundant. Subsection 8(c) would reach cases where it is impractical to delete the sensitive material from the document and subsection 8(b) would be necessary where the government desired to introduce a classified document into evidence. As with subsection 8(b), the defendant would be free to introduce the classified writing, recording, or photograph involved if it is material to his defense. Where, however, the defendant has no interest in or no basis for introducing the document itself, section 8(c) would prevent the needless disclosure of classified information.

Section 8(a) is intended to redress a more limited problem confronted in prior cases where trial judges have required that documents be declassified prior to use at trial. Since classification is an executive rather than a judicial function, subsection 8(a) would permit the government to introduce classified material at trial without changing or eliminating its classification status. The decision whether to continue or modify the classification status of the document after it has been disclosed at trial is best left to the classifying agency.

6. Protective provisions governing disclosure of classified information to defendants

Section 4 of the administration bill and section 109 of the Murphy bill both require the district court to enter appropriate protective orders to safeguard the classified information made available to defendant. The administration bill goes beyond the Murphy bill to list seven types of protective conditions that might be incorporated by the court in fashioning an appropriate protective order in particular cases. I believe that this aspect of the administration bill will provide helpful guidance to judges charged with formulating protective orders, will promote a uniform approach to the safeguarding of classified materials, and will serve to insure that orders issued under the bill will provide adequate security conditions.

7. Imposition of detailed reporting requirements

Section 202 of the Murphy bill would require the Department of Justice to file a written report whenever "the United States decides not to prosecute any individual for a violation of federal law because there is a possibility that classified information will be revealed." The written report is to include (1) "findings detailing the reasons for the decision not to prosecute"; (2) "the classified information which the United States believes might be disclosed"; (3) "the purpose for which the information might be disclosed"; (4) "the possibility that the information would be disclosed in the event of a prosecution"; and (5) "the possible consequences such disclosures would have on the national security." The report is to be provided to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

The Department of Justice opposes the inclusion of such a reporting provision. In our view, the provision goes beyond legitimate oversight and would constitute an infringement of the Executive's function to enforce the federal criminal laws. The provision calls for a detailed written justification of the Justice Department's exercise of its prosecutorial discretion on a case-by-case basis whenever the Department's decision not to prosecute involved as a factor the possible disclosure of classified information. There is, to my knowledge, no precedent for such an incursion into the Executive's traditional responsibilities. Such a statutory requirement would establish a precedent that could lead to the intolerable situation in which the Department was compelled routinely to detail its reasons for not seeking indictments or for dismissing charges or participating in plea bargains in particular cases.

I am unaware of any pattern of intransigence on the part of the Department or failure to accommodate the legitimate informational needs of this committee that would warrant the type of reporting requirements in H.R. 4736. It is my understanding that the Department has undertaken in the past to brief the committee on an informed basis on aspects of particular cases. I would respectfully suggest that a continuation of such a flexible, informal process is more in keeping with the proper roles of two co-equal branches of government than is the regime envisioned by section 202.

In opposing the bill's reporting requirement, I do not mean to question the legitimacy of the underlying concern that a risk of disclosure of classified infor-

mation should not be used by the Executive as an excuse to avoid embarrassing disclosures of government wrongdoing or incompetence and should not lightly override prosecution of a substantial criminal violation. I simply believe that the Committee's concerns in this area can be met without the bill's sweeping reporting provision.

I also have serious doubts regarding the wisdom of requiring the preparation and circulation of at least two sets of written findings disclosing the classified information and detailing all of the ways in which its public disclosure would harm our national security. By definition, such written reports will involve instances where the classified information is viewed by the Executive as so sensitive that protection of its confidentiality overrides the strong interest in prosecuting violations of federal criminal laws. Without denigrating the care with which such reports would be handled by the committee and its staff, I believe that the committee should pause to carefully reflect whether such reports should be routinely required.

STATEMENT OF PHILIP B. HEYMANN, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, ACCOMPANIED BY RONALD STERN, SPECIAL ASSISTANT TO THE ASSISTANT ATTORNEY GENERAL

Mr. HEYMANN. Thank you very much, Mr. Chairman. Thank you, Mr. McClory.

If the rather long and detailed statement that I have presented can be put in the record, Mr. Chairman, I will try and summarize it as we go through and shorten the time.

Mr. MURPHY. Without objection, so ordered.

Mr. HEYMANN. Thank you.

At the outset, I would like to myself thank and commend the Chairman and Congressman McClory and Congressman Mazzoli for the diligent and constructive efforts they and the staff working under them have undertaken in regard to the graymail problem. Following Senator Biden's pioneering efforts last year, this committee held hearings in January that focused additional attention on the need to improve procedures for criminal cases involving classified information. Since that time the committee and its staff along with Senator Biden, the Justice Department and the ACLU have worked to devise legislation that would provide the necessary procedures.

My statement, Mr. Chairman and Mr. McClory, will be divided into three parts. I would like to begin by describing the need for the legislation, then talk in rather general terms about the major ingredients of our bill and of your bill, Mr. Chairman and Mr. McClory, and then I would like to focus on the differences which in many ways are the crucial things for us to be discussing.

The three of us were together at a session where the introduction of your bill, Senator Biden's bill, and the Administration's bill were announced, Mr. Chairman, and you and I said very much the same things on that occasion. The fact of the matter is that three things have to be done in this area. The Government has to be able to try cases, and that means it has to be able to try espionage cases, and it has to be able to try cases against high Government officials who happen to have access to large amounts of national security material. In both those categories, an inability to try cases can be very serious—in one case to our national security and in the other instance to the credibility of the Federal Government and its willingness to police its own activities.

Second, the Federal Government must protect important trial rights. Defendants cannot be seriously prejudiced in any criminal trial. I agree with what Mr. McClory just said, if I understood him correctly, we can't turn the need for protecting defendants' rights into a delicate balance of game advantages. There is no effort in this case of the Federal Government, the prosecutorial arm, to use graymail as an effort to gain trial advantages. We don't want that. We are not thinking in those terms, but rather in terms of the enactment of legislation that will allow us to conduct trials while being fair to the defense. The third important thing is to protect essential national secrets. The procedures that will allow us to do all three can't be stopped by what I honestly believe to be an often almost nitpicking concern for perfect balance-of-trial advantage. We will be generous to the extent that it is reasonable, trying to preserve that balance. If the balance is tilted in a minor way one way or the other, it is less important than that we be able within reason to try defendants in these two important categories fairly, protecting their rights and at the same time protecting those secrets that it is essential to protect and not others.

As you, Mr. Chairman, said on the occasion of the announcement of these bills, sometimes the competing interests can't be reconciled, and we all know what happens when they can't be reconciled. If the Government will not reveal the secret, a fair trial still must go on, and if there cannot be a fair trial without the revelation of the secret, the case must be dismissed. There is no dispute about that.

What is interesting about the piece of legislation that you have introduced and that we have asked Chairman Rodino to introduce, and that Senator Biden has introduced, is that there is a very large extent to which the problems that we are facing here are problems that have no inherent necessity. There is no policy that adequately justifies the difficulties we are all making for ourselves. Under present procedures, decisions regarding the relevance and admissibility of evidence are normally, customarily, made as they arise during the course of trial. There is no good reason why some of these decisions cannot be made before trial. They are now, for example, made before trial in the instance of certain evidence in a rape case as to the woman's prior sexual conduct. Congress passed a statute doing that for very good reason last year, so that it could be done not in front of—so that those rulings could be made prior to trial without destroying a woman's reputation in order to bring a rape case.

If these rulings are made during trial and not prior to trial, which is customary but of no policy or fairness importance, several things happen. One, the Government has no way of knowing whether the defendant intends to rely on important national secrets; and second, the Government has no way of knowing whether, if the defendant wants to bring those secrets out, they are in fact admissible and relevant at trial. Not knowing, the Government must guess and make its decision whether to dismiss or not at a stage before—in a world of uncertainty, as Mr. McClory just said, and as you said, Mr. Murphy, at our announcement.

If we can simply resolve these uncertainties, which I believe we can, without any cost to fairness, the trials of figures who have national security secrets in an authorized or unauthorized way can go forward.

The price of not having them go forward I think we all know. The price is that the American public comes to distrust the system, and that a committee such as this committee can rely less on the checks that exist in the national security and intelligence areas. The costs in the espionage area are obvious, that in some cases there can be no prosecution, despite the importance and the moral blameworthiness of the conduct.

Let me turn from the need for legislation in this area to what the major provisions are, the major provisions of your bill and the major provisions of our bill, because they are indeed very similar in most respects.

I'll start by describing them in terms of our bill, and then later contrast the bills. The key provisions of H.R. 4745 would create a procedure for pretrial rulings and appeals—and this is also of course true of the chairman's bill—on whether classified information may be disclosed by the defendant at pretrial or trial proceedings. That is the issue I have just been discussing.

These provisions would prevent the premature and unnecessary abandonment of prosecutions in the face of either malicious graymail threats or legitimate uncertainties. It would do this by obtaining court orders barring the disclosure of inadmissible classified information or ruling that particular classified information should be admitted.

When classified information is determined by the court to be admissible, the bill provides alternatives to disclosure of the specific classified items and it provides measures other than dismissal if there is no alternative that the Government can accept. The witness' testimony might be struck, for example, or a particular count of the indictment might be struck.

Each of the provisions I am describing, Mr. Chairman, has precedents. Each of them has been done in other areas. This is not a national security exception to fair trial bill. It does not affect fair trial as a matter of principle. The provisions have precedents or close analogies in the areas such as those of domestic informants and the evidentiary rules for rape cases.

Each of the bills has discovery provisions. Each of the bills has an appeal provision that allows an appeal by the Government in this circumstance just as it can now appeal from an order to suppress evidence if issues are resolved against the Government.

We are talking about modest procedural changes in all of the bills. We are talking about things that are not new, and we are talking about things that I believe are plainly fair.

Let me take each of those categories just for about 2 minutes each and talk about the major points to be noted.

The provision in the administration's bill dealing with discovery lists a set of possible alternatives that a court may use rather than order discovery of a highly secret Federal document. We believe that each of these alternatives are now permissible under law, under Federal Rule of Criminal Procedure 16. I believe the chairman's bill does not spell out the alternatives, and I think the Senate bill does not spell out the alternatives. We spell them out because we want to call them to the court's attention. We do not think we are granting new powers in this area. We believe those powers are already there under the present Federal Rules of Criminal Procedure.

I would like—yes.

Mr. McCLORY. May I interrupt? If they are already there, what do you want to write it into the statute for, too?

Mr. HEYMANN. Mr. McClory, a number of the provisions of the statute empower judges explicitly to do things that we now think they have the power to do. For example, Judge Lacey in the Chernyayev and Enger trial in New Jersey did a number of things that the statute empowers a judge to do, and the judge in the *Kampiles* case in Indiana did, too. Other judges have declined to or doubted their power to act. One of the things this bill will do is clarify the power of judges in areas where we believe they have the power, where judges have exercised the power and invite them to consider alternatives that are there for them to consider. If the question were, could a judge do this without our discovery provisions, the answer is yes. Is he as likely to do it if there isn't a statute simply inviting him to consider his powers here, the answer is no, he is less likely to do it.

Mr. McCLORY. Are there different rules in different circuits which would be reconciled by embodying the language in the statute?

Mr. HEYMANN. There is certainly a difference of interpretation at the trial court level. Whether there are different court of appeals rules, I'm not sure.

Incidentally, everything that we are proposing here in the discovery area is far more modest than what the ABA has itself proposed last year. The ABA's most recent standard for discovery and disclosure prior to trial provide that "disclosure shall not be required where it involves a substantial risk of grave prejudice to national security and a failure to disclose will not infringe the constitutional rights of the accused." We are asking for less than the ABA itself proposed.

The system for getting pretrial rulings not on discovery of evidence, not on what we have to turn over to a defendant prior to trial, but on what the defendant may be able to introduce at trial is quite similar in the hills. There has to be a notice requirement. The defendant has to notify us in advance that he intends to introduce particular evidence. The bill includes that. I would simply like to point out that that is precisely the same type of provision that was passed last year with regard to evidence of a woman's former chastity in a rape case. The rape evidence statute, which created rule 412 of the Federal Rules of Evidence, requires the defendant to provide written notice 15 days prior to trial of any evidence of specific instances of the alleged victim's prior sexual behavior which the defendant intends to offer at trial. It is a familiar, at least precedented type of provision.

On the basis of that notice, there is an in-camera hearing procedure which again is wholly analogous to what Congress passed last year with regard to evidence of a rape victim's prior sexual conduct. Again I call your attention to the fact that what we are proposing is very much the same as rule 412(c).

The purpose of the in-camera proceeding is to find out whether the material is admissible, find out whether the defendant wants to use it. It is to prevent, in short, the unnecessary abandonment of prosecutions by making it possible for the Government to determine pretrial

whether evidence that is a national secret will come out. It will allow us to make intelligent decisions.

There is a difference that I should point out on this question of admissibility of evidence between our bill and the bills introduced by Chairman Murphy and Senator Biden. We would require prior to any special pretrial determinations that the Government establish to the satisfaction of the judge that the matter we are trying to protect is properly classified. That has a certain cleanness and it has a certain nonarbitrariness about it. I do not regard these pretrial proceedings that we are all talking about as substantively affecting defendants. I do not think they affect substantial rights. But they do change things. They do change the order of a trial. We would require the judge to be satisfied that what we were protecting was properly classified information before taking the step of altering the timing of consideration of these issues.

I understand the argument on the other side. The argument on the other side is if the judge reaches that determination, he may be somehow or other prejudiced. That is a determination that he will, of course, make ex parte because in an espionage case we will not want to reveal the extent of the secrets we are protecting to a defendant who we believe is a spy. However, we believe that judges are made of a little sterner stuff than is reflected in the concerns of those who don't want the judge to address this issue early.

In any event, the most important fact here, and one that is true to some extent in all bills, is that it is important that a judge who is ruling on relevance and alternatives has to have a certain amount of information before him as to what information the Government is protecting, and why.

The particular alternatives that form an important part of each of these bills are the alternatives that the judge can invoke to substitute for highly classified national security information a summary, a statement, or something that does not reveal precisely what it is the Government wants to keep secret but which does protect a defendant's rights.

Let me focus just for a sentence or two on the importance of this. Very frequently in these cases, what is crucial in terms of a secret, one of the three concerns that we are trying to reconcile here, is highly specific information. What is crucial in terms of a secret is what is the name of the CIA agent, what are the precise characteristics of the weapons system, what is the location of a station. What is crucial for a fair trial frequently does not involve those specific matters at all. What is crucial for a fair trial is that the jury know that a CIA agent urged the defendant to take an action, if this is true, or that the jury know that the weapons system was of a certain sort.

Mr. MURPHY. How about just a memo that it exists, the technology that it exists, and not what it does specifically.

Mr. HEYMANN. That is correct, absolutely, Mr. Chairman.

What we are finding here is that there is a substantial congruence or there is a possibility of a substantial congruence between our desire to have trials without revealing national secrets and the absolute necessity of having fair trials. That congruence lies in the fact that a judge can order a substitute statement such as the Government stipulates that

a CIA agent on this occasion urged Ronald Stearn to do the illegal act. That fully will satisfy the fairness of trial requirements. That will show the conditions under which the defendant acted and, at the same time, it will not reveal the name of the CIA agent which has really nothing to do with the fairness or propriety of convicting and punishing the defendant.

Mr. MURPHY. Would there not be a possibility of entrapment there of some kind, where a defendant could be entrapped into a situation, not knowing that he is jeopardizing national secrets or classified information?

Mr. HEYMANN. Mr. Chairman, that issue, for example, comes up domestically with regard to informants. The Government has a privilege to protect informants unless it is absolutely necessary to disclose their identities. Sometimes questions of entrapment come up. And someimes, not the majority of cases, in a minority of cases it is necessary to reveal the name of the informant in order to fairly deal with the entrapment issue, but in most cases it is not necessary. We are urging the same thing here, exactly the same thing.

Mr. MCCLORY. Could I ask one more question, Mr. Chairman, at this point?

Mr. MURPHY. Sure.

Mr. MCCLORY. You said that you thought it was important at the time that the defendant raises a question, or I guess either side raises a question as to the classified nature of the evidence that one or the other party wants to introduce, for the court to determine if the material is properly classified.

Now, it seems to me that in the Murphy bill if the Attorney General says that it is classified, it is classified, but you are going to then transfer the question as to who determines the classified nature of material from the Attorney General, from the Government, to the court.

Do you think that is a good idea?

Mr. HEYMANN. No; we don't want to do that, Mr. McClory. What we are doing is something close to that. The material would remain classified whatever the judge said in the case. The executive classifies the material and it will remain classified whatever the judge says. We, however, would not trigger a special judicial proceeding without the judge finding that there exists the type of national security concern which in fact warrants classification. In other words, we would maintain that the executive classifies, and only the executive classifies. Whatever the judge says, it would be a classified document. However, these special procedures would not go into effect, which are after all judicial procedures, unless the judge were satisfied that the situation was an appropriate one.

Mr. MCCLORY. But under your bill, the judge is going to determine whether or not the disclosure of the information is dangerous to the national security, and that is, from now on, it is going to be a judicial decision in that type of criminal case.

Mr. HEYMANN. Only in that context, that's right, only in the judicial——

Mr. MCCLORY. And that's not in the Murphy bill is it?

Mr. HEYMANN. It is not. It is a difference between our bill and the Murphy bill and the Biden bill. There are two arguments against this,

Mr. McClory. One is the one you are making that, although it is only for purposes of a judicial proceeding, judges shouldn't be deciding classification-type questions even in that setting, though of course they do under the Freedom of Information Act to some extent.

The other argument is the ACLU argument that the chairman was referring to that this will prejudice the judge, that the judge will, by reaching a conclusion that this is really a national security matter, have already gotten himself in a national security framework and will be thinking in national security terms rather than in criminal trial terms.

We don't want that to happen. We do frankly want, and I think each of the bills allows this, the judge to have some understanding of what are the national security concerns. The reason for that is very simple. If the judge understands the national security concerns, then he can in the process of this hearing say, well, look, a fair trial could be had if the Government will only stipulate that the following was true, and leave out the name of the CIA agent, or leave out the weapons characteristic. If the judge knows what it is we are trying to protect, he can play a creative role in developing alternatives that preserve a fair trial and preserve the secret at the same time. If the judge is not informed as to what it is we are trying to protect, he will be simply bewildered. He will be confused and bewildered.

Just to take an example of that, one of the types of secrets we have problems with disclosing is information that has come from a foreign intelligence agency under ground rules where we have promised the source will never be disclosed. In that type of situation, the only thing that is secret is that it has come from Greenland's intelligence agency. If the judge doesn't know that that is the secret we are trying to protect, the hearing will be some kind of Marx borthers version of "A Night at the Opera" because he will be trying to guess, trying to figure out what we are arguing about, whereas there will be an easy solution. The easy solution will be to strike out where the information came from, which is of no relevance to the defense, and give them all the rest. That is an easy solution that protects fair trial and protects the secret, but the judge has to know what the secret is.

I would like to get to the differences and get the questions and answers, and I have been going on a little bit too long. We all have an appeal provision. The appeal provision is crucial. That, too, adds certainty. I think there is no dispute about the fact that the interlocutory appeal is only a Government appeal. The reason for that, if there is any confusion, is because, of course, the defendant has a full right of appeal after trial, and that is a better right of appeal, tactically, from the defendant's point of view.

The last point to be made, and then let me just compare the bills briefly and turn to you people for questions. We have an exception to the Jencks Act, one that we think is fair but we know will be a source of major dispute on both sides of the Hill.

Our exception to the Jencks Act allows a judge to delete properly classified information if he finds that it is plainly consistent with the witness' statement. The purpose of the Jencks Act is to allow defendants to use inconsistent statements to cross examine a witness. Our provision would say where the judge finds that an item is highly

secret and is plainly consistent, he can before turning a Jencks Act statement over to the defendant, delete that item. That is one of the differences. Now, let me run over the major differences and I will get back to the Jencks Act as I mention the major differences between the chairman's bill and our bill.

In doing that, let me be clear that I think the similarities are much greater than the differences, and that either bill would be extremely helpful. I am going to emphasize why we think ours is better—and we do prefer ours and think ours is better—but either bill would be extremely helpful. It is a happy situation where we find that the differences are considerably less important than the similarities.

One place in which we are different, is that we set forth a standard of admissibility, and our standard says relevant and material. We are not trying to sneak in something by that language. We are intentionally trying to bring in a standard of admissibility for classified information that is just a touch or a half-step higher than relevance. Almost anything can be relevant. Relevant just means it slightly tends to prove or disprove something. Anything that to whatever slight degree tends to prove or disprove something is relevant. We purposely pick a term "material" which is often used as very similar to "relevant" but is just thought to be a touch more substantial. That is the meaning we give it.

The standard we would use—and it seems to us to make very good sense—is the standard that is used with regard to informants. If a defendant wants to obtain the name of an informant and introduce it in trial, or question an informant on a matter of entrapment, the defendant will not be allowed to question a Government agent on the stand about who was the informant and what was the informant's name unless the defendant establishes something a bit higher than some relevance.

If that is true of a narcotics informant, it seems to me that it ought to be true of a CIA informant. I don't see any difference between the foreign informant and the domestic informant. The Supreme Court law is clear, that if defense counsel asks a narcotics agent, who was the informant, what was his name, where does he come from, what was he doing, where does he live, he cannot get that information unless he shows something more than that it may be relevant.

The Supreme Court has discussed it at length in the *Roviaro* case. We think that the same considerations or considerations of at least equal weight apply here. They apply whether we are dealing with CIA agents or sources or locations of stations or the nature of weapons systems. I know that there would be those who would say that much weightier considerations are at stake here than in protecting informants.

In enacting the recent rape evidence rule, Congress went much further. It said that before evidence of prior sexual conduct could come in, there would have to be a balancing, and a balancing that considered the prejudice to the victim versus the usefulness at trial. We are not asking for a balancing. We are asking for something much less, but something a touch, a half-step more than mere relevance. It would give the judge a little bit of discretion to say, yes, I can't say that this secret is wholly irrelevant, but really, Mr. McClory, it doesn't

have much to do with your case, and I'm not going to let it in, something like that.

Now, in the Jencks Act situation, we are likely to come up against cases like the one that we put in the testimony. Suppose a Government agent who witnessed the transfer of a highly classified document to a foreign intelligence agent prepare a statement. If he is a Government agent, he will prepare a statement describing having seen the transfer of a highly classified document, and let's say that he is either honest, direct, open or foolish enough to put in that statement that the person who received the document is the superior of someone that we have reporting to us from the foreign embassy. For instance, that it was the first secretary of such and such a country's embassy who received the document, and that guy happens to be the immediate superior of Peter Smith who has been giving us useful information.

If that happens, if that directness and openness takes place, we will have a statement that under present rules would have to be revealed to the defendant. Remember, in espionage cases we are talking about defendants who we believe are giving secrets to the enemy. The statement would have to be revealed to such a defendant if we wanted to put the witness who had observed the transfer on the stand.

That is a heavy price to pay. The question is, does any requirement of fair trial justify placing that heavy price on us? It won't come up often, but when it comes up it is a heavy price, and that is the only time when the fair trial issue comes up.

We say that there is no reason to pay such a price. The purpose of the Jencks Act—and it is not a constitutional rule, it is not imposed on the States; it is a statute and a rule that the Supreme Court has imposed as wise but subject to congressional modification—is to give the material for cross examination to a defendant. We say that if there is no inconsistency about a particular fact, such as where the recipient of the document happens to be the boss of somebody who has been giving us information, there is no inconsistency in anything that was said on the witness stand with that fact. If that fact is highly secret, as it is in the case I hypothesize, then the judge ought to be able to say, look, you will get the full statement but we are going to strike out what is plainly consistent and of no use to you in cross examination. We are going to strike it out and you don't get that.

The judge already has the power, again in the theme that nothing here is unprecedented, the judge already has the power to strike out anything that he finds unrelated to the witness's testimony at trial. In the example here the information is related; it is just that it is not inconsistent. It is not the material for impeachment. If we give it to the defendant, under your bill, Chairman Murphy—this is a little complicated, as I say it, and I apologize for that—under your bill we would have to give it to the defendant, and if we gave it to the defendant, your bill would trigger the following events happening:

The defendant, if he wanted to ask questions about it, about this individual in some country's embassy who is reporting to us, if he wanted to ask cross examination questions on it, he would have to give us notice. Your bill also requires notice. The judge would then decide whether those questions really have any bearing on the trial, and he would almost certainly decide they have no bearing on the trial because it has got nothing to do with the case.

Under your bill, the defendant in an espionage case—someone we are accusing of being a spy—would get information that is very secret, and then the judge would forbid him to use it at trial, to make it public, but the cat would already be half or two-thirds out of the bag.

We recognize the popularity of the Jencks Act and the fight we are biting off, but we are proposing only a minor modification in the Jencks Act, and you will hear a lot of testimony saying this is outrageous and we don't like the Jencks Act. We are not attacking the Jencks Act. We are trying to make sense of a situation where we think otherwise it is not very sensible.

Mr. McCLORY. Could I ask this question for my own information? I am not too familiar with the Jencks Act.

Does the Jencks Act require the disclosure of information without notice, or does the defendant have to first of all request the prosecution to list any witnesses or evidence which might take him by surprise?

Mr. HEYMANN. Well, I think I have it here, Mr. McClory. I am quite sure there is a requirement of request, but by now it has become so traditional that in any case we know that we automatically have to turn over any witness's prior statements to the defendant at least at the time the witness testifies and generally earlier than that.

Mr. McCLORY. Whether the defendant asks for that information before the trial or not?

Mr. HEYMANN. There is a statutory requirement of request, but it is routine. It is just done automatically.

Just one or two others. On reciprocity, we are worried, Mr. Chairman. We are worried about the technicalities of the reciprocity provisions of the chairman's bill. There are no such provisions in our bill. There are two in the chairman's bill. One of them requires a bill of particulars as to the matter that the defendant may reveal, a bill of particulars specifying what part of our charge against the defendant, whether he be a high Defense Department official or an espionage defendant, what part of it, you know, detailing what our charge is that this may relate to.

The problem here is nobody knows what we are supposed to do in providing more detail. There is already a requirement in the Federal rules of criminal procedure that we provide a bill of particulars wherever the judge finds it useful and sensible for the defense. We are worried that that part of the chairman's bill will not be read as leaving the judge wide discretion to do whatever he thinks is fair and reciprocal, but will somehow or other impose an undefined obligation to become more and more specific. Bills of particulars are something that take a lot of forms, and we don't quite know what we are being required to do here.

There is another part of the reciprocity provision which requires us to tell what our rebuttal will be and who the witnesses will be. We are not at all sure—I want to give you some examples that indicate why—what looks like a fair procedure telling us to tell what our rebuttal will be and what the witnesses will be may turn out to be a very unfair one. If you want a reciprocity provision, I would urge the committee to write it in general terms, leaving it to the judge to do what he considers fair in terms of reciprocal disclosure. Anything else, anything that looks like an absolute rule has difficult and unforeseen consequences.

Let me spell out my worries on the reciprocity provision. Reciprocity, in general, is not always required. That is a good starting place. In the rape evidence rule, the defendant is required to bring forward his evidence as to prior sexual conduct of the victim of rape, but there is no reciprocal obligation of the Government at that point to bring forth its rebuttal evidence. It is not a universal requirement that you give reciprocity here. It is a rule of the game and you do it if you think it is sensible. We are not talking about basic fairness.

If you move to basic fairness in questions of reciprocity, remember that in most cases the defendant is going to be tendering a document we gave him in discovery as something he wants to use at trial. The notion of reciprocity here is that the defendant is revealing his secrets, his case, and now the Government ought to respond by revealing its secrets, its case. In most of the situations we are dealing with here, the defendant is going to have obtained from the Government during discovery documents which are secret. There will then be this proceeding where the defendant will then say I want to use this document that the Government gave me at trial. If the judge rules that it can be used at trial, your bill, Mr. Chairman, and Senator Biden's bill then requires us to come in and reveal more information, anything that goes to show we are going to rebut it, in fairness to the defendant. But remember, the document that the defendant revealed came from us. It is our document that we gave to the defendant to help his case. It is our information that was given to the defendant in fairness to him as required by law that he has now said he would like to use. It hardly seems that equity requires us then to provide an additional amount of information to show how we are going to try to rebut the effect of our own document.

But let me go to practical difficulties.

Mr. MURPHY. Well, let's deal with your example. Let's say in an espionage case or a leak of information case, and the document is a transcript of a wiretap or an intercept of a message by the defendant that brought him into this difficulty, and the defendant's theory is that maybe this was not my voice or it was not the defendant who made the call or participated in the conversation regarding national security information. Don't you think it would be fair to let him listen to a particular recording, the interception?

Mr. HEYMANN. The present Federal Rules of Criminal Procedure, Mr. Chairman, require us, wholly without regard to this provision, to turn over to the defendant any documents we propose to use at trial, any documents that we can see would be helpful to his defense—that is the Brady obligation. I think the document you are describing would be routinely turned over to the defendant without this provision. Part of the reason that we feel reciprocity isn't really fair here is that the Rules of Federal Criminal Procedure require us to turn over a very substantial quantity of material.

Mr. MURPHY. But are you not arguing, this hypothetical memo that you don't want to turn over——

Mr. HEYMANN. Let me give my examples for the next point because they are good examples for this point, Mr. Chairman, and I am not being very clear.

In the *Kampiles* case, it came out that there were a number of copies of some of the documents that were missing—a number of copies—not

just the one that we alleged was turned over to the Soviets. Let's say that that fact, which is relevant, is in a classified document somewhere. Let's say the defendant asks in discovery for any documents indicating additional copies of the material that were missing. We would turn that over, and we would have to turn that over prior to trial, and the defendant would have that.

There would then be a proceeding in which we would argue, perhaps, that that document should not be used at trial. Let's say that it incidentally reveals a number of people who are CIA agents that aren't known to be CIA agents or something else; the mere fact that they were lost, of course, is not a legitimate national secret. But let's say it has other secrets in it. We would have this pretrial proceeding and we would say, what do you propose to introduce at trial, and the defendant would say, I want to introduce that document that talks about other copies that were missing, and we have this proceeding that your bill and our bill contemplates. The judge would look at it, and let's say the judge ruled that the defendant can introduce it.

Under your bill, at that point, we are required to produce all evidence that we have to rebut, to let the defendant know how we plan to rebut his claim that maybe the document the Soviets got was a spare copy that had been left on a street corner by mistake or something like that. We are required under your bill to reveal whatever evidence we are going to bring forward at trial to show that that claim of the defense is false—all our rebuttal evidence and our witnesses.

What is our rebuttal evidence? The defendant here wants to use the document which lists other copies that have disappeared to show that it wasn't he who delivered a classified description of a weapons system or an intelligence system to the Soviets, but that somebody else probably did it or that the Soviets may have found it on the street corner. Our whole case is the rebuttal to that. Every bit of our evidence that the particular defendant was seen taking the document, was seen meeting the Soviet agents, was seen walking down the street, at the point of the transfer, may be treated as the rebuttal to the defendant's proposed use of that single piece of paper listing copies that had been lost.

What we are worried about is that under your bill and under Senator Biden's bill, for a small part of the defense case, perhaps, we may have to reveal our whole case pretrial. We are even worried that it may become a substantial part of a pretrial game, that defendants may, in order to get earlier, full revelation of the Government's case, do a little bit more graymailing.

I regret the fact that this is a very complicated area. I guess I would just say in summary that it is very complicated. I know that as I say it that it may be too complicated orally without papers in front of us. What I am saying is that what looks like sensible rules of reciprocity—the bill of particulars provision and the provision that requires us to produce our witnesses and our evidence that we will use as rebuttal—may create substantial disadvantage and unfairness to the Government, and we don't think that there is any substantial disadvantage and unfairness to the defendant if they aren't there. The defendant, without these provisions, is no worse off than in the rape case. The defendant, in most cases, will have gotten the information from us in the first

place. Our case is largely exposed by discovery, by the indictment, and by normal bills of particulars. We don't think there is any unfairness if there is not an additional disclosure requirement. We think that there may be confusion in the courts of appeals, uncertainty, and reversals of convictions as a result of the reciprocity provisions. If it were felt that there ought to be some reciprocity provision, I would leave it to the judge to decide in his or her wisdom. The judge can see, for example, that a document does not have much to do with the defendant's case, and could determine that fairness does not require the Government to reveal its whole case as "rebuttal" evidence. I would leave it to the discretion of the judge.

Finally, there is obviously an issue between us on the question of detailed reporting by the Federal Government. The chairman's bill requires a detailed report by the Government on all aspects of why we have failed to proceed in a case. There are two sets of problems that come with that detailed reporting requirement. One set of problems is easy to address. There are good reasons in some cases for protecting the privacy of why you don't proceed with a case. There may be grand jury secrecy aspects. We may not be proceeding because of something that came out in the grand jury that we should not reveal and cannot reveal without a court order. There may be rights of persons involved who have not been formally accused. We may not be proceeding because we have concluded that somebody else was heavily involved who was charged. To reveal that is not proper.

There may be, and there frequently will be, a number of reasons that caused us not to bring a case. I can think of cases where there was a graymail issue that would have been a major issue but I didn't want to bring the case anyway. I simply didn't want to bring the case, and so I said no indictment, although there would have been a graymail issue.

In short, I think the committee has to take some care in what is an unprecedented request in reporting on our discretion. I know of no precedent that would ask us to say precisely why we didn't prosecute.

Now, let me say that there are healthy informal procedures that are already at work here. This committee has felt free, and I think correctly and wisely so, to call upon us to explain why we didn't prosecute in the ITT cases, and witnesses have come up, either in executive session, as was thought appropriate, and have at least explained what the national security considerations were.

It is the additional formality of requiring a detailed written statement that may require us to compromise privacy of individuals and grand jury considerations and that will be the first detailed review of our discretion that we question.

I wouldn't in concluding, be honest with you if I didn't say that I think there will on occasion be a substantial concern about putting a national secret in writing in a formal document that is to be circulated. And let me give the category clearly because it is very easy. There would be no concern, I think, about keeping the committee fully informed. We do have cases where people will die, where people will be promptly executed, if their identities are revealed. I have had cases that I believe fall in that category during the year and a month or two that I have been in my job, and they keep me up at night as I am

sure they keep you people up at night. In that category of cases, I am sure that we will want, the intelligence community will want, and the defense community will want a very special form of reporting because simple release of the name might result in the death of the individual identified.

That is all I have to say, and I appreciate the long time allowed me, Mr. Chairman.

Mr. MURPHY. Thank you, and you have been most informative as usual.

Our next witness is Ms. Deanne Siemer, General Counsel of the Department of Defense. The Department has taken a great interest in graymail legislation and is responsible for many of the provisions which we will discuss today. Ms. Siemer is no stranger to this subcommittee. She has testified several times before the subcommittee, and we continue to have the highest opinion of her legal ability and judgment.

Ms. Siemer, welcome and please proceed with your statement. I know you were engaged in a numbber of activities other than this, in helping putting some departments together, and we understand your time constraints and we appreciate you appearing here today.

STATEMENT OF DEANNE SIEMER, GENERAL COUNSEL, DEPARTMENT OF DEFENSE

Ms. SIEMER. Thank you very much, Mr. Chairman, Mr. Mazzoli, Mr. McClory. I do appreciate this opportunity to appear before you and talk about H.R. 4736 and H.R. 4745. I have not submitted a prepared statement because I am appearing this morning primarily in support of the Department of Justice. We worked closely with Mr. Heymann and his staff on the bill. We support the bill and we support his explanation of the bill.

We also second his view that H.R. 4736, the chairman's bill, provides important improvements in this area, and we believe the differences in the two bills can be bridged readily.

As you indicated, Mr. Chairman, we have terribly important interests at stake here. The Department of Defense produces more classified information than all the other Government agencies combined. Our focus here is largely on defense weapons information although we obviously have important intelligence interests at stake. In either case, defense or weapons kinds of information or intelligence information, the Defense Department's interests are protected by these bills, regardless of the reason for classification.

In our view both these bills provide an important protection for our defense interests because they sharpen and narrow the balance to be made in what Mr. Heymann has referred to as the disclose-or-dismiss dilemma. We believe that even with these bills the problem still exists. In some cases we will still try to persuade Mr. Heymann to dismiss a prosecution rather than suffer the disclosures that would be required in a fair trial.

But these bills provide procedures for us to narrow the issues so that we will know precisely what is at risk. We will know precisely what classified information will have to be revealed, and we will have legally

enforcible assurances that no other information will have to be revealed.

At present, as you know, we have to speculate about what might be revealed and what might have to be disclosed under certain circumstances, and, as responsible lawyers, Defense Department counsel, to take into account every possible circumstance that could affect us. This broad view obviously tilts our recommendation toward dismiss rather than toward disclose. If we know precisely what has to be disclosed, and we have those legally enforcible assurances that nothing else will have to be disclosed, I think the balance goes the other way. That will more often result in a decision to go forward with prosecution.

We also agree with Mr. Heymann's assessment because H.R. 4745 has been built on existing procedures, it provides a balanced system of protections for the defendant as well as the Government. For us it removes the element of surprise, which is our most significant problem in the current system of ad hoc handling of classified materials in criminal trials. The administration's bill includes virtually everything that we outlined when we testified before your committee last February. We support H.R. 4745, and we urge that the committee report it out favorably. ...

Mr. MURPHY. Thank you, Ms. Siemer.

Let me ask just one question as long as I have both of you before me.

Have there in the past been differences between the Justice Department and other departments dealing with security matters as to moving ahead with prosecutions?

Mr. HEYMANN. Yes, there certainly has; and there will continue to be, Mr. Chairman. The most important thing I think for me to say right at the beginning is that, in the 14 months that I have been there, I have never seen a case where I did not think that the intelligence community or the Defense Department was proceeding in complete good faith trying to protect legitimate and continuing national secrets. I have not seen any cases in which I thought there was an attempt to cover up scandal, impropriety, or embarrassment.

Still, there are differences. Our disposition is heavily to prosecute. That has been Judge Bell's disposition; it will be Attorney General Civiletti's disposition. As Deanne said as she was going through, when there is a question of real doubt, the disposition of the intelligence community and of the Defense Department will be not to risk disclosure by prosecuting. However, the system is working, administratively. It works by Deanne and me and the General Counsel of CIA Dan Silver, sitting down and discussing the issue, trying to resolve it, and, if we can't resolve it, taking it to the Cabinet level. There the Attorney General has the power to decide, subject to an appeal to the President, and in most cases it works out fine. It is a friendly but heated discussion.

Ms. SIEMER. And in that context, Mr. Chairman, what we are talking about here is narrowing the discussion. When Phil and I discuss what might happen, for example, in a Kampiles-like situation, Phil will say, "Well, I think the risk is not great that this information will come out." I'll say, "Phil, I think the information is terribly important and the risk is terribly great." We are talking about relative risks. If we eliminate that discussion and Phil says to me, "Deanne,

this is all that is going to come out, this sentence, that's it, and you have legally enforcible assurances that nothing else will come out" we can discuss what to do with that information quite readily. And as Phil says, when we know what it is, we can almost always reach agreement. Our differences are primarily in our assessments of the risks. My client is different from his client, and my client doesn't want to take those risks. His client, the people of the United States, do want to prosecute the case.

So, by narrowing those discussions and permitting us to get to the heart of the case much more easily, this bill does a very important thing.

Mr. MURPHY. The question is, though, there is another party to all of this, and that is the defendant, and while you are having your discussions and you may be all satisfied that you have narrowed the issues to your satisfaction, Justice, CIA, Defense, and so forth, the defendant's rights may be abridged in some way.

Ms. SIEMER. I am talking about only the disclose-or-dismiss decision, primarily the dismiss decision. Our discussion at the outset of whether we should dismiss or not will be narrowed.

Mr. HEYMANN. Nothing that we do, Mr. Chairman, will in any way affect the defendant's rights. The bill that you have introduced and the bill that we have introduced are designed to and should protect the defendant's rights to use whatever is important to a fair trial. All of that has to be protected.

What we are talking about and what Ms. Siemer and I are saying is that having protected that, we will be able to then make our decisions, as the chairman himself said at the announcement of these bills, we will be able to make our decisions much more easily. We will know what the court has done. The court will say this will come into evidence. I'm going to admit this, but I'm not going to admit that. And we will know that we have to argue about just one of the two items. And we will resolve it. Should it be introduced, should we allow its disclosure for purposes of trial or not?

Mr. MURPHY. There is some concern that it is more likely that the legislation we are discussing here today would be used against one particular class of defendants than another.

Is this true, and if it is not, in what kinds of cases is it most likely to be used?

Mr. HEYMANN. I myself see two classes of defendants affected—everybody has a concern that it is only aimed at one of them—and I can never guess which one they think it is aimed at, Mr. Chairman. The statute will plainly be useful in espionage cases. For example, it would have been useful in the Kampiles case or in the Enger and Chernyayev case in New Jersey. It will plainly be useful in cases involving high Government officials. If I were today charged with perjury before this committee or any of a number of crimes, I believe it could be quite difficult to try me because of the marginal relevance of national security information, for the names of informants that I would insist as a matter of fair trial I would have to be able to reveal. It would probably be considerably harder to try Ms. Siemer. I mean, that would turn out to be impossible. Her testimony is quite contrary to her interests.

The two categories of cases are classic espionage cases, of which we have perhaps three, four, five a year in an average year, plus cases that involve high Government officials, the pending FBI case is obviously the most immediate example, or people who are closely associated with the intelligence agencies. The ITT cases involving private individuals were of that sort.

There is one other category that concerns me the most, and I haven't mentioned that, and that is overseas corporations' operations, bribery matters, this could become a substantial issue in that type of case if it were not dealt with by legislation.

Mr. MURPHY. Thank you.

Mr. McClory.

Mr. MCCLORY. I am concerned about the reciprocity provisions. It seems to me that when we have classified information which a defendant may or may not want to utilize in the course of his trial, that there should be some sort of obligation on the part of the Government to produce it, at least in response to a bill of particulars. Otherwise, the defendant may be deprived of an opportunity to defend himself fully.

Don't you think that an exception in the bill which would provide some kind of a reciprocity requirement would be important?

Mr. HEYMANN. Let me try and state our——

Mr. MCCLORY. You made the rape case analogy, but I am wondering whether there is a valid analogy.

Mr. HEYMANN. You know, it depends a lot on the circumstances, Mr. McClory. What we are talking about is what do we as a country, what do you, that is the best way to put it, as legislators, owe the defendant if the defendant is required prior to trial to reveal to the Government and the judge what classified information he plans to use? That revelation is necessary if we are going to have pretrial rulings on admissibility, but the question is, does that disadvantage the defendant in such a way, having tipped his hand, that the Government ought to have to tip its hand some, too?

My rape analogy simply pointed out that we don't always—it isn't precisely analogous to the rape case, I don't think—but we don't always when some policy leads to one party having to tip its hand a little, we don't always require the other party to tip its hand. I think the issue in the prior discussions at the staff level has been somewhat overblown in its importance one way or the other.

In some cases I can imagine it would be fairer to require the Government to tip its hand some if whatever the defendant had to reveal in the way of classified information he planned to introduce really did reveal his case, Mr. McClory, really told us where he is going, what he is going to do, how he is going to try to prove it. If he told us all of that, it would certainly seem fair to me that the Government provide some responsive discovery of what its case will be.

Mr. MCCLORY. Then you do need some section in the bill to——

Mr. HEYMANN. The trouble is trying to get a balance. The trouble is that it may be that in trying to deal with that situation, which I think may be the unusual one, where there is real unfairness in requiring the defendant to tip his hand, we may create greater unfairness as well as unduly complicating cases. If it is a document that we have given on discovery that the defendant now says he intends to use, I'm

not sure that I feel there is any unfairness in our not having to provide further disclosures.

But the main problem is that frequently the defendant will ask to introduce what may be only a minor part of his case. He may say, look, I would like to introduce the following classified secret, and it may be a very small part of his case. We are worried that the language in the chairman's bill may require us to reveal all of our case in response to a very minor tipping of the defendant's hand. Reciprocity is, after all, some notion of equity and fairness and equality. It may be simplest not to require reciprocity here at all, but if it is going to be required, we don't want it to tilt to the point where there is even an encouragement to ask for documents that have a minor part in your case in order to see the whole Government case in advance.

I guess my answer, Mr. McClory, is that if there should be reciprocity, keep it general. Leave it to the judge. There is no reason to think judges are going to tilt in our favor on an issue like reciprocity and be unfair to defendants. But let them tailor something that is balanced and sensible. Otherwise, if it looks like it is a plain rule written by Congress as to what has to be done, we are afraid there are going to be many cases where there are going to be arguments, appeals, disputes, and unfairness in the form of requiring us to do ridiculous things for a minor disclosure.

Mr. McCLORY. Do you concur in that, Ms. Siemer?

Ms. SIEMER. I do, Congressman. I think the reciprocity problem that you are looking at occurs primarily in the Government official kind of a case. As Mr. Heymann says, in the traditional espionage case, that is rarely a problem because it will be triggered by an attempt to use something that the Government has given up

The only category of cases where reciprocity might be important is the high Government official case. The knowledge is in his head and he might produce a statement with respect to his defense—how I intend to testify and what I intend to lay out in my defense. That very narrow category of cases is well recognized and is protected under current rules.

Mr. McCLORY. Well, I am thinking more of the case where you prosecute the person for breaking and entering, or allege that he stole something or he attempted an assassination of somebody, and this was a criminal conduct, and he says, well, my God, they told me to do this. This is national security, and he needs an awful lot of information that it seems to me may be denied him.

Mr. HEYMANN. Well, he would get that information, you are right, Mr. McClory, that he would need a lot of information, but he will get that on discovery. He will get that not because of Mr. Murphy's provision which says that once he tells us the secrets that he is going to try and reveal at trial, we have to give him a lot of information as to how we are going to meet those secrets. He will get it because prior to the trial he will come up before the judge and he'll say I can't prepare my defense without knowing all the following information from the Government. And we will be required under rule 16, and not changed by this statute, to give him that information.

Mr. McCLORY. There is nothing in either one of the bills that indicates the effective date of this proposed legislation.

What is your perception as far as the effective date? And what would be the effect with regard to offenses that have already been committed, even pending prosecutions?

Mr. HEYMANN. We frankly haven't thought about it, and we certainly haven't discussed it. I would think that it would rather naturally apply to any trial that had not yet taken place, and probably the appeal provision should not apply to trials that have already taken place, or pretrials that have taken place.

We ought to write a provision like that, and I would also suggest, Congressman McClory, that we submit to you a proposed reciprocity provision that doesn't have the terrors for us in it.

Mr. MCCLORY. That would be very helpful.

Mr. HEYMANN. OK.

Mr. MCCLORY. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. Heymann and Ms. Siemer, maybe you can address yourselves to the problem that you brought up at the end of your statement on the written reports that you would feel could be compromising and difficult.

I wonder, first of all, if that is a joint position in which the Defense Department agrees, and second, would you have, and have you thought or are you in a position to recommend to this committee any alternative to it at this point?

Ms. SIEMER. Let me just address whether it is a joint position. It is very much a joint position, but we join it for a different reason. The reporting requirement might be so difficult for us that we would support prosecution rather than dismissal plus reporting. Our view was that that was an interesting way to force us into a compromise with the Justice Department. We thought they had been very clever about that. But it is very much a joint position.

Mr. HEYMANN. I think there are alternatives that would work very well, and I think the crucial characteristic of the alternative is informality, Mr. Mazzoli. In other words, I think that the right people to review these decisions are the intelligence committees, perhaps not to the exclusion of others, but primarily. I think there is real advantage to your reviewing the decisions, among other reasons because I think that we are all up against the claim that what is really involved—you are going to hear it as you have testimony—what is really involved in graymail is the Department of Justice covering up for the sins of the CIA or the Department of Defense or the Department of State.

That is not what is involved and we won't let it be involved. I like the idea that there would be a legislative committee of substantial respect concerned about legitimate secrets but not about covering up dirty laundry of the executive that would be in a position to ask the question: Was there a secret here that was important?

But it ought to be done informally and it ought to be done carefully.

Mr. MAZZOLI. In other words, you would think—do I take it from this statement of yours that you would not be adverse to responding to a request from this committee or this full committee to come up and discuss the last 6 months' worth of cases that have for one reason or

another not been prosecuted, that you would bring with you documentation, information that would let this committee make an intelligent decision on whether or not the guidelines are being followed, whether or not there was, as you use the word, coverup.

It that your feeling, Mr. Heymann?

Mr. HEYMANN. That is very much my feeling. I should say, Mr. Mazzoli, that on this one I would have to talk to Ms. Siemer, and she probably won't want to tell us right now.

Mr. MAZZOLI. I understand.

Mr. HEYMANN. And I would have to talk to the Attorney General. But that is very much my feeling. I think that is the way it ought to be done. I think it ought to be done, and I would see no great problem in that. If it were the name of someone who I thought would be killed on that occasion, I would say let's try to avoid using and given names, as I would with Defense or CIA. I would just as soon not have the name myself.

Mr. MAZZOLI. Let me ask you this question on the Jencks Act. You suggested there ought to be some changes. If I understand correctly from testimony we have had earlier this year and last year, the government has been very successful in most of its espionage cases in which I presume somehow you have managed to live with the current interpretations of the Jencks Act, and I wonder if you could briefly address yourself to whether or not you find the current Jencks Act totally impossible to deal with, whether you have been lucky in the past, whether it takes additional effort but can be lived with, and where you feel within the order of priorities that Jencks Act amendment would rate.

Mr. HEYMANN. The Jencks Act has not been a major problem for us, Mr. Mazzoli. It is a relatively small part of the bills that we are talking about, your bill, the chairman's bill, our bill. Among the range of problems it is relatively small.

We happen to believe that what we are proposing is right in that handful of cases where it will turn out to be a problem. We believe that what we are proposing is fair, just and reasonable, and we believe that the attacks on it are bigoted, biased, irrational and generally poorly motivated. [General laughter.]

Mr MAZZOLI. But other than that, they are pretty decent.

Mr. HEYMANN. That's right. [General laughter.]

But it is not a major problem area, and that is the question you asked.

Ms. SIEMER. Could I add one thing, Congressman?

Mr. HEYMANN. It may turn out to be a serious problem in particular cases. It just will not arise in a very high percentage of cases.

Ms. SIEMER. That was the point I was going to make. It is a significant problem for us because before we can make anybody available to the Justice Department, even a prospective witness, we have to go back and see what might come out simply of making him available. We have to go through another series of discussions and negotiations about who can be available for the prosecution.

Under this proposal, the best witness can be available for the prosecution, the prosecution can go forward as efficiently as possible, and you have no adverse effect on the defendant. It will have a significant effect in specific cases.

Mr. HEYMANN. And what Deanne is saying ties in very closely with what I was saying. The reason that we can live with what we regard as a not sensible disposition here is because we can avoid calling the best witness. We can call another witness. We can keep the witness, in many cases, from talking in the area at all so that the judge would naturally strike that part of his prior statement. But these are all distortions of the process for no good reason. We ought to, if we are trying to establish that the KH–11 manual is crucial to the national defense, we ought to call the strongest witness, not the witness who has given no prior Jencks Act statement. We ought to call the witness and ask the witness all the questions that would be helpful to the jury, not avoiding an area where something might come out wholly consistent with his statement, but that was a national secret.

Ms. SIEMER. And turn it on the other side. If we decide that a particular witness has to be made available for a prosecution, we shouldn't be prevented from using that important manpower for other purposes. For example, suppose the secret is disclosed. We may have one fellow who is very expert in that. If we decide to make him available as a witness, we may not be able to use him to do the damage assessment—to figure out what went wrong, how much damage we have sustained and what we should do to protect against it. It may be a tradeoff against meeting the Justice Department's requirements and meeting our own internal requirements, and those damage assessments have to be done very quickly. They are terribly important to us. But we may have a tradeoff right there at the outset, we have to think about prosecution before the case is even beginning to be brought.

Mr. MAZZOLI. I thank you, and thank you, Mr. Chairman.

Mr. MURPHY. Chief Counsel has a couple of questions.

Mr. O'NEIL. Mr. Heymann, you suggested that a standard similar to that applied for Government informants be used in determining whether classified material may be used at trial. You suggested the Roviaro standard. Do you believe that the Government would be unable to argue that Roviaro applied in these kinds of situations absent the standard you would like to see, the standard that is in 4745?

In other words, if 4736 was enacted as it is written in this area——

Mr. HEYMANN. No; I think we would be in a position—it depends an awful lot on the legislative history and it depends on the type of discussions we are having right now. I think we would be in a position where we could argue it. I would hope we would be in a position under Chairman Murphy's bill where we could argue that the Roviaro standard applies. We urge it in our statute because we want the rule to be clear, we don't want to have to argue it in every district court, and we would like it to be settled once and for all.

Mr. O'NEIL. Section 8(b) of 4745 would provide the authority for the Government to introduce only part of a document at trial. There you appear to have left the determination under the provisions of the section to the court, based on the current concepts of admissibility and use.

Why didn't you suggest the Roviaro standard there since you are providing an exception to the current Federal rules?

Mr. HEYMANN. In that particular provision, what we are doing is authorizing the Government to delete sections—tell me if I have the

wrong section, but I think I have the right section—we are authorizing the Government, with the approval of the court, to delete sections of let's say a classified document. That is a step that seems to me to be entirely justified and fair. These are documents that are going to be introduced by the Government as part of the Government's case. This is not a provision for deleting something that the defendants wants to go into at trial. The materiality standard is a standard that would limit what the defendant can put in at trial. This is a provision that allows us to delete and restrict what we ourselves put in at trial. Now, that makes a lot of sense in the following circumstance. If someone steals a document and gives it to the Soviets and it involves 150 secrets, if we want to prosecute them for espionage, we ought to be able to pick any five secrets; say pages 1 through 5 of the document, and prosecute them on that basis. That means that the price of prosecution is only revealing 5 secrets publicly, not 150, and that is what the provision is intended to do, allow us to limit the secrets that are part of our case, not part of the defense case.

Mr. STERN. This is just to authorize the court in dealing with the document to delete certain items. If the defendant wanted to go into those items, the defendant would have a copy, in an espionage case for example, of the entire document and the propriety of the deletions would presumably be discussed and argued about before the judge. If the defendant wanted to go into any of the items that were deleted, then the other provisions of the bill would be triggered and the Roviaro standard would be picked up and used to determine whether the defendant could reveal certain of the items that had been deleted from the document.

Mr. O'NEIL. So you feel that it fits.

Mr. STERN. I don't think that there is any inconsistency between the 8(b) provision and the Roviaro standard that is incorporated in the bill generally.

Mr. O'NEIL. And lastely, section 8(b) provides authority for the government not to declassify a document by introducing it into evidence in a criminal trial to be covered by these procedures. Classification is an entirely executive branch kind of process. Why is this necessary, this section? I'm referring to H.R. 4745.

Ms. SIEMER. It is necessary because of the problem about public disclosure that arises under the Executive order and the Freedom of Information Act. You don't have security clearances for the jury. You don't have security clearances for the judge. There is an argument that if you disclose classified information to someone who does not have a clearance, it has been made public and therefore, is available under the Freedom of Information Act or has to be declassified under the Executive order. Our problem here is meeting that. This section meets it head on and says plainly that the statute permits classification to continue even though classified material is used in any way in a trial setting. That is all that provision does.

Mr. HEYMANN. It is an entirely technical point. We have taken the position in some cases that we could not reveal classified material to the jury without first declassifying it. This statute will allow us to reveal it to the jury and to the judge without first declassifying it. The trouble with having to declassify it was that once it was de-

classified, we couldn't then keep it secret from the world at large 2 months later. If we wanted it to be a secret two months later, having declassified it for purposes of trial, it was difficult to avoid Freedom of Information Act and other demands for it.

Mr. MURPHY. Ira, do you have a question?

Mr. GOLDMAN. Rule 403 of the Federal Rules of Evidence states that evidence is generally admissible if its probative value outweighs the prejudicial effect.

What prejudice is being referred to? Is it prejudice to the truth determining process of the court, is it prejudice to any of the parties? The rape evidence rule speaks in terms of prejudice, but again it doesn't specify whether you are talking about the victim's rights or the truth determining process.

Can the Government's interests, the national security be considered a factor in determining prejudice?

Mr. HEYMANN. I would think that we plainly could not claim that it was under those rules of evidence. I would like to know what Ron and Deanne have to say about that, but the question really is could we have used or could we use that rule of evidence to accomplish many of our purposes by saying that the prejudice to the Government from having to reveal a national secret is adequate for the judge to deny admissibility of particular evidence? I think that is not the type of prejudice they had in mind, and I do not think we could use that.

Deanne, do you?

Ms. SIEMER. It would not do what I am arguing is the primary benefit of this bill, which is to narrow the discussion. If I had to rely on that rule, I would go right back to my position that there is a risk that everything be revealed, and the risk with respect to the broadest possible perspective has to be weighed against the Justice Department's interest in prosecuting. That puts back into the system all the uncertainty that currently exists.

If I could use that rule now, I would. I can't.

Mr. HEYMANN. And the prejudice that they are presumably referring to there is the prejudice that comes when you show particularly gory pictures of the murder victim. It is the prejudice to the very truth-finding process, the bias it builds into the jury.

Mr. GOLDMAN. Section 6(c)(2) of the Justice Department proposal states that classified information can only be disclosed at trial if the court makes a written determination that the information is relevant to defendant's case.

Do you anticipate then that—or do you desire that classified information would not be used for purposes of impeachment, and would that provision preclude such use of the information?

Mr. HEYMANN. We certainly intend the same rule to apply to impeachment, you know, to let's say cross-examination of a witness, that classified information can only be used if the other standards of the bill are applied and satisfied.

I take it your question is: Haven't we in this provision absolutely ruled out any use of classified information for impeachment purposes, and had we not better together look at it carefully? We certainly didn't intend to and it should not. You know, in an appropriate case—the Jencks Act issue is that very issue. Classified information may be cru-

cial for impeachment, and if it is essential and it can't be summarized and you can't do something else with it, then it may just have to come in.

Mr. GOLDMAN. Section 111 of the chairman's bill provides that the Government shall make known to the defendant what portion of the classified information, let's say in a document that has been given to a foreign power, what portion is going to be used by the Government in proving its case.

Do you have any comments on that provision?

Mr. HEYMANN. I wish we had thought of it.

Deanne, do you have any problem with that?

I think it is—we have discussed it within the Justice Department. I have not run it through the entire system. I think it is probably a highly desirable addition.

Ms. SIEMER. In practical effect, that is what has to happen anyway. That is not a practical problem. On whether it should be a statutory requirement or not, I would defer to the Justice Department. This is a prosecution problem; it is not a Defense problem. Once you get this far, how they deal with the case is their problem.

Mr. GOLDMAN. Well, it could be a Defense Department problem in the sense that in the KH–11 case, would it have been helpful or would it hurt if you said, we are only going to use pages 10 through 23 to prove that the document relates to the national defense?

Ms. SIEMER. But notifying the defendant that that decision has been made is not my problem. Once that decision has been made, I am happy. It is his problem to get the person convicted. I would defer to them as to whether this is necessary or not.

Mr. HEYMANN. This seems to me to be a perfectly appropriate reciprocity-type provision. If we are going to use only part of a document, the defendant ought to know in advance that that is the part that the defendant had better be concentrating on showing is not related to the national defense.

Mr. GOLDMAN. One final thing as to the application of this law to currently pending cases. Would you have any problem with it only applying to cases that had not reached the indictment stage on the day of enactment, so it would only apply to cases indicted after the law came into effect?

Mr. HEYMANN. I think we would have no problem with that. I mean, I think it is something we ought to discuss. We certainly have no intention of trying to get the statute through in time to deal with any pending case that we are having trouble with or anything else. We don't mean that, and any sensible rule as to when the statute starts up would be fine with us.

Mr. GOLDMAN. Thank you.

Mr. MURPHY. Mr. Raimo?

Mr. RAIMO. Mr. Heymann, you are proposing a standard of more than just mere relevance for classified information, and you offer the new rape evidence rule as precedent. As Mr. Goldman pointed out, the new rule is still in the same words as rule 403. It says such evidence may be introduced if it is relevant unless its prejudicial effect outweighs its probative value.

How is the new rule, as you say in your statement, an example of Congress going further than the *Roviaro* case?

Mr. HEYMANN. Why did I say that it went much further in the rape area?

Mr. RAIMO. Yes. It seems to me to just restate rule 403 in a specific case.

Mr. HEYMANN. I think the balance that the new rule for rape cases requires isn't one between prejudicing the jury at trial and relevance of evidence but the harm to the woman versus the usefulness at trial, the harm to the woman from having here reputation damaged as a result of a public trial. In that way it is very similar to the type of issue we are talking about where the harm is from revelation of information at a public trial.

What I was suggesting was that the standard used in the rules of evidence really did suggest something more of a real balancing effort. You may disagree with it, maybe, but that is a disagreement about a rule of evidence in rape cases. I was suggesting it required a little bit more of a balance than we are suggesting would be appropriate here, really deciding how much would the woman be hurt, how important is it at trial.

If I am wrong about that, I am wrong about that. That is what I I was suggesting, and I was certainly saying that we are not asking for a balance between the national security concerns, the importance of keeping secrets, and the importance of a fair trial. All we are asking for is that there be a touch more than the most marginal relevance, that it be something more than an argument that, if you will excuse the term, a law school professor could make that perhaps it was relevant. We want it to be something that a judge would look at and say, yes, that could be helpful at trial. And that is the Roviaro standard. The Roviaro standard is relevant and helpful. That is the language. We used material because we thought it was a little bit offensive for the judge to be deciding what was or was not helpful for defense counsel. We don't like that language.

Ms. SIEMER. What they did in the rape rule was an attempt to go beyond the general evidence rule. The rape rule says that the probative value of such evidence must outweigh the danger of unfair prejudice. It was an attempt to go beyond a finding of prejudice and to go to the danger to a woman in having this kind of testimony come forward. The legislative history makes clear that they want to go beyond that, and that it is a tougher test for the person who is pushing to get the evidence in. What we are saying here is that you don't need to go into that balancing here if you adopt the flat standard that the Justice Department is proposing.

Mr. STERN. I think the fact that the rape evidence rule was put in the Federal Rules of Evidence—it is rule 412, and it is only a couple of rules after the general rule you cited—is an indication that that general rule is meant to apply to the prejudice to the defendant's rights to have the truth-determining process be untainted and is not a balancing of some other interests, like the interests of the rape victim, or the Government's interests in protecting national security information. There is an important distinction between balancing extraneous interests against the importance of the information to the

defendant because in the context we are talking about, the Government has some very, very important interests.

The administration's bill would limit the standard by focusing solely on the importance of the material to the defendant and would not allow that to be overborne by very, very important national security information. So I think the focus in the administration bill is properly where it should be, on the importance of the information to the defendant.

Mr. McCLORY. Well, actually, aren't there overriding social and political reasons for both the legislation that modified the rape rule and this legislation? I mean, there is a public demand for, in the rape rules, to not only protect the interest of the victim, but likewise to see if we can't get more prosecutions, get more willingness on the part of victims to assist in the prosecution, and in this case, we don't want criminals, whether they are spies or whether they are robbers or whatever they are, being let off scot free because they claim that classified information is involved, and you know, you can't prosecute me; otherwise I am going to destroy the national security.

Mr. HEYMANN. There are a lot of parallels all the way, as you said—I think it is quite striking what you said, Mr. McClory. There are parallels all the way to the fact that the rape rule is intended to help us bring rape cases. Otherwise the victim will not appear, and the rules we are talking about here are intended to help us bring espionage or abuse of office or perjury cases.

Mr. MURPHY. Well, I want to thank all three witnesses again. I appreciate your time from what I know is a busy schedule.

And one point that I think we just touched on lightly, Mr. McClory touched on lightly that I think is very important is that if we can come to a consensus on this legislation and we can get the Senate and the House to agree, it will have to address I think in a particular fashion to pending cases and those cases that are contemplated, we are kind of changing the rules maybe in the middle of the stream, and I think it is very important that we deal equitably with people's rights.

Mr. McCLORY. Mr. Chairman?

Mr. MURPHY. Yes.

Mr. McCLORY. Could I ask one more question? I intended to raise this before, but I won't now. You may have already examined the other testimony that is going to be presented here. At any rate, would you mind, if you think there are any egregious claims or misstatements made, to communicate some sort of a rebuttal to the committee so that we can have the benefit of that statement?

Mr. HEYMANN. It would undoubtedly be a pleasure, Mr. McClory.

Mr. MURPHY. Thank you, all three of you.

Our last witness this morning is Mr. Morton Halperin, Director of the Center for National Security Studies and a member of the American Civil Liberties Union.

Mr. Halperin will represent the ACLU in his testimony today. Mr. Halperin has also appeared frequently before this committee, and his testimony is always thoughtful and always calculated to provide an alternative view.

Mr. Halperin, welcome and please proceed with your statement.

STATEMENT OF MORTON H. HALPERIN, DIRECTOR, CENTER FOR NATIONAL SECURITY STUDIES, ON BEHALF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CENTER FOR NATIONAL SECURITY STUDIES

Mr. HALPERIN. Thank you, Mr. Chairman. It is a pleasure to appear once again before this committee.

I might say in view of the complimentary things that the distinguished Assistant Attorney General said about my remarks, I am tempted to rest on the record, but I think perhaps I should seek to deal with some of the points that he made.

I have a prepared statement and I would like to have that submitted for the record.

Mr. MURPHY. Without objection, it is so ordered.

[The prepared statement of Mr. Morton H. Halperin follows:]

PREPARED STATEMENT BY MORTON H. HALPERIN

Mr. Chairman, I appreciate the opportunity to testify on the Classified Information Procedures Act bills now before this subcommittee. I am testifying today on behalf of the American Civil Liberties Union, a national membership organization of some 200,000 members dedicated to the protection of the Bill of Rights, and on behalf of the Center for National Security Studies, a private research organization jointly sponsored by the Fund for Peace and the ACLU Foundation, and dedicated to preventing claims of national security from being used to interfere with constitutional rights.

From a civil liberties point of view the legislation being discussed today creates a possible conflict between the need to stimulate the government to prosecute those who use their official positions to deprive others of their rights, and the necessity to protect the rights of all criminal defendants. Because this bill would affect rights of defendants at trial it goes to the heart of the system of criminal justice. We therefore urge this committee to conduct careful hearings and in particular to examine the views of experienced trial counsel about the probable consequences of the procedures authorized by the legislation. In our view these hearings are likely to indicate that the bill needs amending to ensure that it does not deprive any defendant of his or her constitutional rights.

We would have preferred to see this bill as one section of a comprehensive charter for the intelligence agencies. Under the express assumption that restrictive charters are to follow, however, we do not object to the consideration of H.R. 4736 as a separate piece of legislation if it fully protects the rights of defendants.

It is more important to be clear at the outset about what this bill does not do. Although it is often described as "graymail legislation" the bill would not—and could not consistent with the First Amendment—prohibit a criminal defendant from threatening to make public classified information in his or her possession. Furthermore, it would not substitute for a lack of will on the part of the government to prosecute or to make public classified information which is relevant to a prosecution. In our view the lack of such will has been the primary impediment to proceeding with prosecutions directed at such former high officials as Richard Helms and L. Patrick Gray.

Although the legislation is no substitute for a willingness to prosecute official wrongdoing, it could permit a more orderly process for deciding whether to go forward with a prosecution. The procedures established by the legislation would permit the government, in many cases, to learn before trial what classified information would have to be made public. To the extent that these procedures could facilitate such prosecutions while protecting the existing rights of criminal defendants, we welcome the introduction of H.R. 4736 and the holding of these hearings.

Mr. Chairman, it is important to emphasize that we would oppose this legislation if it were interpreted to authorize secret trials, or to permit judges to issue

gag orders prohibiting the press from publishing what it learns about any pre-trial proceedings or the trial itself. I do not believe that it can be interpreted this way or that it was intended to be.

We would also oppose this legislation if its effect was to authorize trial judges to inhibit defendants from releasing any information which was in their possession prior to discovery in a criminal trial except in connection with the trial or pre-trial proceedings. Thus, for example, if the bill authorized a judge to prohibit a defendant from making a speech or publishing an article revealing information in the defendant's possession we would be forced to oppose it on First Amendment grounds. Any such provision would enable the government to circumvent the very strong presumption against prior restraint even as it relates to national security information, *New York Times* v. *U.S.*, 403 U.S. 713 (1971), *Nebraska Press Assoc.* v. *Stuart*, 427 U.S. 539 (1976), by indicting the person and invoking the procedures of this act. Because section 102(a)(1)1 lines 24–25 is subject to the interpretation that it authorizes such orders it needs to be redrafted.

I should also say, Mr. Chairman, that in practice I do not believe that these procedures will have any real impact on prosecutions for unauthorized disclosure of information. What the bill could do, without compromising the rights of defendants, is to facilitate the prosecution of intelligence agency officials and others who, under color of law, violate constitutional rights.

Any legislation which accomplishes these twin objectives must adhere closely to certain constitutional principles enunciated by the Supreme Court. As I read H.R. 4736 it intends to adhere to these principles, but I would hope that hearings and possible amendments as well as the legislative history of the bill will make that unmistakably clear.

The first and most fundamental principle is that the standard for discovery and admissibility of evidence cannot be affected in any way by the fact that the information involved is classified. This rule and the important considerations of fairness that underlie it have been stated by the Supreme Court as follows:

* * * in criminal causes "* * * the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense. * * *" 345 U.S. at 12.

In *United States* v. *Andolscheck*, 142 F. 2d 503, 506, Judge Learned Hand said:

"* * * While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully. Nor does it seem to us possible to draw any line between documents whose contents bears directly upon the criminal transactions, and those which may be only indirectly relevant. Not only would such a distinction be extremely difficult to apply in practice, but the same reasons which forbid suppression in one case forbid it in the other, though not, perhaps, quite so imperatively * * *"

Jencks v. *U.S.*, 353 U.S. 657, 671 (1957).

Indeed the government has generally conceded this point. For example, the Supreme Court noted in a case involving highly sensitive national security electronic surveillance records:

The government conceded that it must disclose to petitioners any surveillance records which are relevant to the decision of this ultimate issue [of whether illegally seized evidence was used]. And it recognizes that this disclosure must be made even though attended by potential danger to the reputation and safety of third parties or to the national security—unless the United States would prefer dismissal of the case to disclosure of the information.

Alderman v. U.S. 394 U.S. 165, 181 (1969).

Indeed the Supreme Court in that case was unanimous in holding that a defendant was entitled to "arguably relevant material whatever its impact on national security might be." Id. at 184n15.

The second fundamental principle which the bill must reflect is that the "burden is the Government's not to be shifted to the trial judge, to decide whether the public prejudice of allowing the crime to go unpunished is greater than that attendant upon the possible disclosure of state secrets." Jencks v. U.S. at 672.

The trial judge cannot make the decision as to whether the injury to national security is limited enough to justify release of the information. It is the judge's task to tell the government that he or she intends to permit introduction of the information; it is the government's duty to then decide whether to proceed. In this context we believe it would be a mistake to permit the government to explain to the court why the information is classified, or even the basis for the classification, prior to a judicial determination of relevance. The danger is that the trial judge will permit the decision on relevance to be colored by the claims of national security, exaggerated or real, made by the government.

The third principle is that of reciprocity. The requirement in the bill that defendants disclose prior to trial what classified information in their possession, if any, they intend to introduce at the trial, is constitutional only if it is accompanied by a requirement for reciprocal disclosure by the government. See *Williams* v. *Florida*, 399 U.S. 78 (1970), *Wardius* v. *Oregon*, 412 U.S. 470 (1973). The reciprocity provisions now in this legislation are, we believe, sufficient to meet the requirements of due process. However, any weakening of them would raise serious questions about the constitutionality of the statute.

Mr. Chairman, my comments thus far have been addressed primarily to H.R. 4736. Since I understand that in most cases the Administration is prepared to accept the provisions of H.R. 4736 I see no reason to discuss the many minor differences between the two bills before this committee.

However, there are three substantial areas of disagreement between the bills on which I would like to comment.

The most important issue is the Administration proposal to modify the Jencks Act. We would strongly oppose passage of this legislation if any provision amending the Jencks Act was included in this legislation. The provision in the Administration bill violates the fundamental principle that no otherwise discoverable information can be withheld from a defendant. The provision would permit District Court judges to do for classified material precisely what the Supreme Court said they cannot do for any information, classified or not, included in a prior statement of a government witness relates to his or her testimony at trial.

The practice of producing government documents to the trial judge for his determination of relevancy and materiality, without hearing the accused, is disapproved. Relevancy and materiality for the purpose of production and inspection . . . are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility—e.g. evidentiary questions of inconsistency, materiality and relevancy—of the contents and the method to be employed for the elimination of parts immaterial and irrelevant.

Jencks at 669. Citation and footnote omitted.

That this rule must apply even when information properly comes within the state secrets privilege was made clear by the Supreme Court in *Dennis* v. *U.S.*, 384 U.S. 855 (1966) and *Alderman, supra. Dennis* states that it is not "realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purpose, however conscientiously made, would exhaust the possibilities. In our adversary system it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate." The Court went on to note that the trial judge's function is limited to such measures as protective orders when "the nation's security" is involved. Id. at 874, 875. The Court ruled that a task analogous to the determination of relevancy—determining if illegally seized evidence had tainted evidence introduced at trial—could not be performed by the trial judge ex parte. The Court explicitly rejected a proposal by the government, supported by two members of the court, that national security information be treated differently. The Court held that even when national security information might be revealed the trial judge could not be permitted to determine if

evidence was tainted. In reasoning directly analogous to the task of determining if a statement can be used to impeach a witness, the Court noted that:

The task is too complex, and the margin for error too great, to rely wholly on the *in camera* judgment of the trial court.

Alderman at 182.

The recent experience in *U.S.* v. *Humphrey*, Civ. No. 78-5177 (4th Cir., appealed Aug. 16, 1978), illustrates the danger of the proposal contained in the government bill. In its brief to the Court of Appeals in that case the government conceded that under current law the trial judge may not withhold prior statements of government witnesses even if they are classified. The government argued, however, that certain material turned over to the court late in the trial and partially made available to the defendants is not *Jencks* material and that even if it was it could not have been used to impeach the government's chief witness at trial. The defense argued vigorously that the material was clearly within the *Jencks* rule and that it could have been used to discredit the witness to the degree that an acquittal would have been likely. Without going into the merits of the particular case, the controversy illustrates the difficulty of having the trial judge decide what might be used to impeach a witness. The case also demonstrates the inappropriateness of relying on appellate review to correct any mistakes of the trial judge. Appellate courts are less familiar with the facts and are in a far worse position to determine if the material could have been used effectively. Deference to the trial judge on factual matters will mean that few convictions would be reversed for failure to provide classified *Jencks* material.

The second major area of disagreement between the bills concerns the timing of the court's decision on relevance and when it is informed by the government as to the reasons for the classification of the information. The Administration bill and the Biden bill in the Senate, S. 1482, permit the government to make an ex parte in camera presentation to the court of the reasons for classification before the court determines whether the information is admissible. Although not intended by this provision, the court may well consider the consequences of disclosure in determining admissibility. I would, therefore, urge that this committee preserve the procedures outlined in H.R. 4736. These procedures may appear to be more cumbersome because of the careful way the bill spells out each step. However, in practice they would be no more complicated than the procedures in the Administration bill.

The third major issue is that in the reporting requirements. I want to state clearly our view that these provisions are among the most important in the bill. I want to reiterate my earlier point that the problem in this area is not "graymail" at all, but the governmental will to prosecute. By requiring the adoption of procedures and reports to the Congress, the legislation would make it less likely that fears of embarrassment and protection of one's colleagues could successfully masquerade as national security concerns. These provisions do not in any way interfere with the Executive's responsibility for determining when prosecution should be pursued. That power, as are all powers of the Executive, is open to oversight and scrutiny by the Congress. Oversight is also relevant to Congress' legislative power since it bears on such issues as whether Congress should create a special office to conduct all prosecutions involving classified information.

Mr. Chairman, that completes my prepared remarks.

Mr. HALPERIN. And I would like then, if I may, in the interest of time, just to summarize the points that I made.

Mr. MURPHY. Without objection.

Mr. HALPERIN. I want to begin by commending the committee for the testimony that it is going to hear this afternoon from experienced defense counsel. I think it is extremely important that their views and their experiences be brought to bear. In conversations with them thus far we have already identified a few points where I think there are ambiguities in the bill that were not intended, some of which I will mention, and I think therefore it is likely that there will have to be some amendments to the bill to deal with ambiguities and problems deriving from the experiences of those attorneys.

As you know, we view this bill as creating a potential problem in the degree to which it in anyway restricts the rights of defendants. We do believe that it is possible to draft legislation which does not in any way reduce the rights of defendants and at the same time provide for the kind of early procedure in deciding what can be admitted, which as the Defense Department witness this morning testified is the key reason why the Justice Department wants this bill. But I think it is important in providing for that particular purpose which is the central purpose that the Government has, that we not go beyond that to do things that are unintended or which in anyway changes the rights of criminal defendants.

Now, I think it is important to be clear in the legislative history that the bill does not do certain things, that it does not authorize secret trials, for example, and also—and this is one of the points I want to mention because I think there is an ambiguity in the legislation—that it does not inhibit the rights of defendants to release information outside of the trial which they already have in their possession.

Let me give you one of the hypotheticals that has been suggested might be covered by the literal wording of this bill. If the Government, instead of bringing the civil suit against the Progressive magazine for publishing the article that deals with the concepts of the hydrogen bomb, had indicted the editors of the Progressive for conspiracy to violate the atomic energy statute by releasing this information, the Government could then go into court under this bill and get a court order that it could not release the content of the article in connection with the case without the permission of the court. The way the bill is written, that order would appear to apply not only to the court proceedings, but to the publication of the article in the Progressive or in some other form.

I don't think that is intended, but I think if you look at the literal meaning, the literal wording of section 102(a)(1), it says that the defendant shall not disclose or cause the disclosure of such information unless authorized to do so by the court in accordance with this title. I assume that was meant to mean shall not release such information in connection with the proceedings in the court case, but I think it is important that a change be made to make clear that the Government cannot get prior restraint by bringing a criminal indictment and invoking these procedures.

There are several fundamental principles which the American Civil Liberties Union believes must be adhered to, and adhered to precisely, if this legislation is not to reduce the rights of criminal defendants. In my view, as I read H.R. 4736, it does not violate those principles, but I have to say that in my view, the administration bill does violate those principles. Three of the items which I discuss in my testimony and which were discussed in the Justice Department testimony I think do raise fundamental constitutional issues, although the Justice Department is trying to suggest that it simply, that we had overblown the significance of these. And I think the testimony, with all respect, is misleading in that it suggested these were not issues with which the Supreme Court had already dealt. As I try to suggest in my statement and as I shall refer to briefly, I think the Supreme Court has already dealt, and dealt very precisely and very clearly with these issues.

The first one involves the question of the standard. I think the Supreme Court has been absolutely clear in quoting a number of times with approval the *Andolscheck* decision of Judge Learned Hand, and in the *Alderman* decision, the Supreme Court said what the standard was, and the standard was exactly the one that the Justice Department does not want. The Supreme Court said in that case that arguably relevant material, arguably relevant material, whatever its impact on national security might be, must be disclosed to the defendant in a criminal trial, that the fact that the information is classified cannot change the standard.

And there, of course, the Supreme Court was talking about wiretaps of suspected Russian agents, and indeed, apparently wiretaps on embassy facilities. And it said, and the court was unanimous, though it differed on other issues, in believing that arguably relevant information must be disclosed.

I think that is the standard. I think it would be a great mistake for this committee to try to change the standard. I don't think constitutionally it could do so, and indeed, I would urge you to make clear in the legislative history that there is no intention to change the standard, that you reject the administration's proposal that the informant standard, which I think has no relevance to this kind of situation, apply, and that you make it clear that you intend to leave the law exactly where the *Alderman* decision left it, that arguably relevant material must be disclosed, whatever its impact on national security.

Now, the second issue has to do with whether the Government or the trial judge should decide whether information is properly classified and these procedures should be invoked. Our view is that the standard of classification is sufficiently low that it is not a real safeguard and that it is a mistake to get the trial judge into deciding in these circumstances why the information is classified or whether it is classified. The decision of the Supreme Court has said it is for the Government to make and not be assumed by the trial judge, of deciding whether information is sufficiently a threat to national security that the Government should not go forward with the trial.

The third issue is that of reciprocity, and I think there is a fundamental constitutional issue, and it goes to the right of a criminal defendant to remain silent, the right of a criminal defendant not to reveal information prior to the Government's case or during the Government's case, or indeed ever. Criminal defendants have the right to remain silent at all times. This bill proposes a specific obligation on criminal defendants. First, it requires them prior to trial to notify the Government when they intend to use classified information that is in the possession of the defendant. And second, where the information is in the possession of the Government and the defendant have got it on discovery, it requires the defendants to explain in advance how they intend to use that information because in order to participate in that pretrial hearing on relevance, they must explain to the judge what their legal theory is and what their evidence is that makes this information relevant. And when you require a criminal defendant—I think the Supreme Court has been very clear—when you require a criminal defendant to reveal information prior to trial that he or she otherwise would have the right to remain silent about, you must provide reciproc-

ity, and the reciprocity must equal the injury or the possible injury that is done to the defendant.

Now, the Justice Department suggests that since the purpose here is not to gain an advantage for the prosecution but simply to permit an orderly procedure, reciprocity may not be in order, but the issue is not the purpose of requiring this information to be revealed, it is the consequences of it. And the consequences are that the Government will know what the defendant intends to do and will be able to address its case in chief to deal with that information. And that I think must be dealt with by reciprocity. It is not appropriate to leave it to the judge to decide whether there should be reciprocity. I think one always has different experiences depending on the side of the table you are on. The notion that judges are always lenient in discovery is I think not the experience of lawyers who have defended in cases that might be involved here, and I think it is up to the Congress when it establishes a new rule requiring defendants to speak before trial, that it make absolutely clear to the trial judge that there must be full reciprocity for those disclosures.

Let me turn then to three areas of remaining disagreement in addition to those which I frankly had hoped were behind us in the disagreements about this bill. The first and most important has to do with the Jencks Acts. It is important to understand that this is an issue that the Supreme Court has specifically dealt with, dealt with in the *Dennis* case, in which the issue was precisely the question of whether where information might be classified the trial judge could make the determination that the information could not be used effectively for impeachment. The Supreme Court dealt precisely with this issue and said it is not realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purpose, however conscieniously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by the advocate.

And the Court went on to note that the trial judge's function was limited to such matters as protective orders, making it absolutely clear that it had in mind classified information when it said, very simply, the determination can properly and effectively be made only by the advocate.

And what the Government proposes here is to in effect try to overrule that decision, which I think is constitutionally based, and nevertheless is based in a fundamental notion of commonsense, namely, it is only the advocate who can decide whether something can be used for impeachment.

Now, we have a precise example of that in the *Humphrey-Truong* case. Since you are hearing this afternoon from Mr. Tigar, who was a counsel for the defense in that case, I will not go into it. Suffice it to say, the record in that case reveals a disagreement on whether a piece of Jencks material could have been used effectively for impeachment and showed precisely why, in my view, that decision cannot in fact be left to the trial judge.

Finally there is the issue of reporting requirements, and I think the reason why these requirements should be in the bill were stated very clearly by the witness from the Defense Department who sug-

gested that confronted with the choice, the Government might go forward rather than report, and I think that the reporting requirements are an essential element to insure that these provisions are not used to avoid embarrassment or other forms of improper reasons to withhold information.

I think one does not have to call into question the integrity of the current Assistant Attorney General to suggest that in the past and perhaps in the future people might classify information within the executive branch to avoid embarrassment. Indeed, every study that has been done for the Government of the classification system has concluded that information is improperly classified, and every President who has issued a new Executive order, Mr. Carter, Mr. Nixon, Mr. Eisenhower, have all said that the previous system did not work and information was improperly classified to avoid embarrassment.

Now, it may be that a miracle has occurred in the last 14 months and no longer is any information classified for embarrassment but that miracle may fade away, and I think these reporting requirements are important.

I want to mention briefly two other issues which are not in my statement. The first has to do with the section for the Government when it presents information, section 4(b) I think it is in the Government's bill, and section 109(b) in the chairman's bill. I think it is important to rewrite those provisions to make it clear that all of the safeguards in rule 16(b)(1) requiring information to be put in writing the records preserved and so on, be included in this provision, and that it be made clear in the legislative history that the purpose is simply to permit the court to exclude material which is not arguably relevant to the defense, and that the intention of that provision is not to allow the Government to withhold information which is arguably relevant.

Finally, I want to say something about this issue about whether putting information into evidence declassifies it. I have no objection to the provision that is in the bill since the administration seems to find it useful to be able to say that it is not declassified. But I think it is important that the suggestion in the testimony not be permitted to stand, namely, the suggestion that you can give evidence to a jury in a criminal trial and not have that evidence made public. I think that violates the provisions of a public trial. I think it is clear that if the evidence goes to the jury, it is in fact public, and that if the evidence is submitted, it is part of the public record of the trial—I'm not talking about pretrial proceedings, I'm talking about the trial itself—is available in the office of the court for inspection by anybody who wants to see it.

Now, if the Government wants to nevertheless say we haven't declassified it and therefore we don't have to give it to you in Washington, you have to go to the trial court, subject to whatever rules the judge has to get that information, I don't think there is any objection to it, but I would not want to leave on the record, the implication, that by including that provision in the bill this committee was sanctioning the notion that one might have a secret trial in which information was given to the jury but could not be reported publicly in the newspapers and would not be available to spectators sitting in the courtroom.

That completes the summary of my statement, and I am pleased to be here and I would be delighted to answer questions.

Mr. MURPHY. Thank you, Mr. Halperin.

With reference to your comments on protective orders, would not the inclusion in the statute of the details which you feel necessary, such as a clearing of persons who would examine classified information, suggest more control over the defense than is proper, and when the defendant or his attorney could be denied access to certain material.

Mr. HALPERIN. I think there is some confusion about my position. I do not favor the inclusion of those provisions. I think that there is authority, the Supreme Court has frequently——

Mr. MURPHY. That is Mr. Heymann's position.

Mr. HALPERIN. Yes. I think the Supreme Court has frequently referred to such, to the authority of the courts to issue protective orders to protect national security information, and there is no objection to codifying that in the bill, but I think the judge doesn't need a shopping list. Indeed, that seems to me contrary to Mr. Heymann's general position that these things should be left to the sound discretion of the judges. In this case I am happy to agree with him.

Mr. MURPHY. Now, you note that your primary concern is the first amendment ramification of the proposed legislation. Is it your position that a judge cannot prevent the defendant from publicly disclosing classified information information he or she intends to use at trial? And does it make any difference in your argument whether or not the classified information was obtained from the Government?

Mr. HALPERIN. It makes all the difference. I think the trial judge can provide information to the defendants on discovery and issue an order which prohibits disclosure of that information in connection with the case or in any other forum, but I think if the information is in the possession of the defendants prior to the initiation of the case, the protective order can only be applied to the case itself and cannot prohibit the person from making a speech or writing an article.

Mr. MURPHY. What if the information came to the defendant in the course of his employment?

Mr. HALPERIN. I don't think that affects it. It may be that the Government could indict the person for releasing the information, and it may be, under the Government's theory of the prior-restraint laws, although not mine or the ACLU's, you go into court and get a prior-restraint order. But I think it is important, indeed essential, that this bill not be the form for authorizing prior restraint on information that is in the possession of individuals prior to the trial. I think that is a difficult, complicated area, one which the committee might want to consider in separate legislation, but I think this bill should not be used in a way that encourages the Government to indict people so as to keep them from speaking out on information of some other kind.

Mr. MURPHY. I notice in your prepared remarks, Mr. Halperin, that you criticize one provision of our bill, and that is the provision that would require the Justice Department to bring to us a report of those prosecutions they have declined and reasons therefor.

Mr. HALPERIN. Again I may have written sloppily.

I am strongly in support of those provisions. I don't discuss them very extensively——

Mr. MURPHY. Would you favor an oral presentation of that or a written presentation?

Mr. HALPERIN. Well, I must say I don't see any objection to withholding a particular name if the circumstances are that the person's life would be directly in jeopardy. I must say, I have not studied these provisions very closely. I don't read them as requiring the provision of the name to make the explanation of why one is dropping the case. If one says the reason is that a name is relevant to the defendant but if we reveal that name an active American agent would be killed and therefore we dropped the prosecution, I don't see that that requires you at all to reveal the name of the person.

I must say that it seems to me it ought to be possible, and I thought these provisions did that, of writing reporting requirements which require reports to this committee which again I would think is essential, without requiring revealing of particular information which the Government feels should be conveyed only orally or conveyed not at all, but simply the generic category, and if the provisions are read to require that, it seems to me it ought to be possible to change them without going to the very informal system that the Justice Department was suggesting which just says, well, if this committee is interested it can call us up and we'll testify. I think there is some place in between those two with formal reporting requirements but with some flexibility, and obviously the committee would be able to react by saying no, that argument doesn't seem right, tell us more, some flexibility to withhold information of a kind which was not relevant to the determination but which would have very serious consequences.

Mr. MURPHY. Mr. McClory?

Mr. MCCLORY. I gather you don't really attach too much significance to this legislation as far as prosecutions or lack of prosecutions, or interests or rights of defendants, are concerned. You indicate on pages 2 and 3 of your testimony that you do not believe that these procedures will have any real impact on prosecutions for unauthorized disclosure of information, and you indicate that it is more the lack of will on the part of the Justice Department with regard to Richard Helms and Patrick Gray that has already resulted in the dismissal against Helms and I guess matters are still pending so far as Pat Gray is concerned.

Do you want to elaborate on that a little bit?

Mr. HALPERIN. Well, I think that, my judgment is that in many of those cases the Government could have gone forward. All these, I should say, occurred, with the exception of the Patrick Gray situation that has not been resolved, before the current occupant of the position of the Assistant Attorney General, Mr. Heymann, so that nothing I say here I think is intended to reflect at all on his position or his report on what has happened since he has been in office.

My view of the Helms case, and it is one that I have looked at in considerable detail, is that it was not necessary to reveal any information which had not already been made public in order to go forward with that prosecution, and I think the decision not to go forward had to do with an unwillingness on the part of some people to prosecute somebody who they felt had dedicated his life to the service of the Government and had done things in good faith.

Mr. MCCLORY. Do you think that it is really an excuse when it is claimed that the absence of this kind of legislation prevented them

from prosecuting, that this whole legislation is regarded as an excuse or an alibi for the Justice Department to not prosecute, and they say now we can do it and we couldn't before?

Mr. HALPERIN. And now they may do it, yes. Let me say two things about that. One is I think there is a separate problem which I think is reflected in the Helms case which the legislation cannot deal with, and indeed, I would object if the legislation tried to deal with it, is precisely the first amendment point which I mentioned before. If the graymail or blackmail is done not in the context of the trial but simply if you prosecute me I will publicly reveal the following 17 things, I don't think there is any way the legislation can deal with that. I think if it is a crime to reveal those things, the Justice Department ought to point that out to the person, but I don't think the legislation can deal with that problem.

Second, what I do think the legislation can do is——

Mr. MCCLORY. Well, those things are going to be dealt with in camera, are they not. As in the Foreign Intelligence Surveillance Act, we have a secret hearing.

Mr. HALPERIN. Yes, but there is nothing—we all seem to be indicting ourselves here. If I am indicted and I say to the Government I will reveal something that I—I will call a press conference next week and reveal something that I learned while I was on the staff of the National Security Council if you persist in going forward with this indictment, this legislation can't deal with that problem, and I think that part of the graymail problem has been that kind of threat rather than a threat to do something within the course of the trial.

Mr. MCCLORY. Well, I think you are talking about the commission of a second crime, though.

Mr. HALPERIN. Yes, right. Well, it is not clear, though. Sometimes the revealing of information publicly is not a crime. I mean, as you know, what is—but that is a muddy field. But that's right. And insofar as it is a crime, I think the way to deal with it is to say if you reveal that, we will indict you for this other crime. I don't think this legislation can deal with that.

What I do think this legislation can do—and I don't want to be misunderstood—is exactly what was described in the colloquy up here between the Defense Department and the Justice Department, that is, in a pretrial situation there is often an argument about what are we likely to have to reveal in the course of a trial. I can see the Defense Department or the CIA taking the position: we don't want to begin the trial, introduce the evidence in our case, and then find when we get to the defendant's case that we have to reveal a great deal more classified information, then be forced to drop the prosecution because we are not prepared to reveal that, but we have already done the damage of revealing the information in our own case, and therefore since it is uncertain what the judge will permit in on the defense, we ought to drop the case.

I think what the bill does deal with effectively is precisely that situation. The Government can go in a pretrial proceeding, get a ruling from the court about what is going to be introduced during the entire trial, barring surprises and uncertainties, and then make a reasoned decision about whether it wants to go forward. I think it is in the na-

tional interest that that be done, and I think the bill does that and does that effectively, and my hope is that that will, in fact, lead the Government to go forward with additional prosecutions in these areas.

Mr. McCLORY. You expressed apprehensions that section 102, I believe it was, of Mr. Murphy's bill, would permit an additional criminal remedy against the publishers of the Progressive magazine, and suggested—at least I interpreted your statement to be—that there should never be any right to indict to prevent prior publication.

Is that your position?

Mr. HALPERIN. Yes, I think——

Mr. McCLORY. Isn't that right qualified? I mean, it would seem to me that there could be certain information which, if published, would indeed jeopardize our national security, and the right to prosecute to prevent that publication should exist.

Mr. HALPERIN. Well, certainly the Government can prosecute somebody who it thinks is conspiring to break the law, and in that context it can certainly seize the evidence so that if you, in fact, come upon a Government official about to give something to a Russian agent, you can seize the document and prevent him from transmitting it.

I don't think the Government has the right—and I certainly do not think this bill ought to convey the right—to get a prior restraint order on releasing information which is in the head of an individual by indicting him for a different crime, which is what I think is at issue in this legislation.

Mr. McCLORY. Well, you know they had the old example—I guess it is a World War I example, the time and place of the troopship sailing. Is that——

Mr. HALPERIN. Well, I mean, there is a separate issue of whether prior restraint on the release of information relating to the national security is ever appropriate. That is an issue which was before the Court in the *Pentagon Papers* case and is before the courts in the *Progressive* case. My own view is that such prior restraint is always a violation of the first amendment, but that issue, it seems to me, this committee ought to leave where it is and let the courts deal with it.

What I would object to is a provision in the bill which could be read as specifically providing additional authority to the court to issue prior restraints against speech by criminal defendants of information which they had before they were indicted.

Mr. McCLORY. Well, of course, we are trying to deal with a problem that exists in a criminal prosecution, and incidentally could be interpreted to relate to a criminal prosecution such as the *Pentagon Papers* case, the *Progressive* case, the *Chicago Tribune* case, or whatnot. It seems to me that we have to let the issue lie where it is.

Well, OK; thank you very much.

Mr. MURPHY. Mr. Mazzoli.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. Halperin, I appreciate your testimony. It is helpful and will be helpful as we proceed further on the bill.

In the early part of your statement you talk about the "arguably relevant" Supreme Court holding—I believe the quote was "arguably relevant material must be disclosed whatever its impact on the national security."

Just to advise me, when you say "must be disclosed," do you mean disclosed to the defendant with the question of admissibility being later, or do you mean published?

Mr. HALPERIN. No; I think what the Supreme Court was talking about here is disclosed to the defendant, and it went on to say—in another case, it said that the courts could issue protective orders.

So I think there are two issues here. One is, any information which is arguably relevant has to be disclosed although it can be with a protective order to the defendant so that he is in the position to make the case that it is admissible. Then when the decision comes as to admissibility, I think there again the standard must be exactly the same as it would be if the information were not classified.

Mr. MAZZOLI. Do you think there is really a need for any additional legislation at all in this whole area?

Mr. HALPERIN. I think the one clear need—and again the point that the Defense Department seems most interested in—is a provision which makes it clear to trial judges that they can require criminal defendants to reveal prior to trial what classified information they intend to use at trial, to get a ruling prior to trial as to whether that information will be admissible. My view is that that is the only thing that this bill does that is not already in the criminal procedures and the Federal rules, and one could strip the bill down just to that and accomplish the purpose; that might avoid some of these ambiguities.

On the other hand, I think there is no objection to restating other powers that already exist, to put them in one place, provided it is made absolutely clear that we are not changing any standards and not depriving defendants of any rights. But I think that one change in procedures is appropriate, would make a significant difference, and could make a real difference to the ability of the Government to bring prosecutions, and particularly the ability of the Justice Department to persuade the Defense Department and the CIA that they ought to be willing to go along with prosecution.

Mr. MAZZOLI. Well, I certainly thank you very much. You have been very helpful.

Mr. MURPHY. The Chief Counsel?

Mr. O'NEIL. Mr. Halperin, would your position in regard to the Jencks section in H.R. 4745—your opposition to it—be lessened if the defendant had an opportunity to examine the statements the Government believes are consistent, with an opportunity later to argue in camera as to inconsistencies, that is to say, keep the standard that the Government proposes, but disclose in camera under protective order to the defending attorney——

Mr. HALPERIN. Well, my understanding is that you don't need to amend the Jencks Act to do that, that is, turning over the information to the defense counsel, which is all that is at issue here, does not mean that he or she can introduce it at the trial. The Government can then object to the introduction of that sentence at the trial precisely by arguing that it is not inconsistent, and that the trial judge then would make a ruling as to whether it was inconsistent or not. I think under the other procedures of the bill that argument about that could, in fact, be in camera, provided it was an adversary proceeding.

What the Government is trying to do is to prevent that information from reaching the defendant on the grounds that it is so sensitive that it can't be turned over even under a protective order.

So I think what you are proposing is already in fact in the bill and does not require any amendment to the Jencks Act.

Mr. O'NEIL. You stated earlier your opposition to the interpretation voiced by Mr. Heymann concerning the question of declassification of documents at trial. The kind of thing that you are afraid of is what happened in the Kampiles trial, as I understand it. There a document was introduced into evidence, was not declassified, and was not made available publicly, nor has it been. It has been sealed with the rest of the exhibits and remains under seal pending the appeal which has been taken in the case.

Do you feel that was an inappropriate order by the district court?

Mr. HALPERIN. Well, I think in part, at least in light of the Supreme Court decision of a few days ago, it turns in part on whether the defendant concurred in that. I think it is still—I would have said a few weeks ago that it didn't matter, that the defendant could not even concur in that, but even under the current Supreme Court interpretation of public trial, it certainly cannot be done over the objections of the defendant, and I think that case was wrongly decided, if I may say so, and that the public trial provision, as the dissents in that case rigorously argued, are a public right and not simply the right of the defendant.

But certainly there is nothing in that decision or any other decision which suggests that that can be done over the objections of the defendant, and I don't know whether the defendant in that case concurred or not.

And my view would still be that if it was introduced in evidence, it is a public record of the court and is subject to inspection at the courthouse.

Mr. O'NEIL. Lastly, you say that you are greatly in favor of the provision of title II of H.R. 4736 which requires reports to the Intelligence Committees of cases involving national security matters where prosecution does not ensue.

What do you say to the criticism that this kind of reporting is going to politicize what has essentially been an independent prosecutorial function heretofore? That is to say, committees of Congress may urge prosecutions where they may be inappropriate, and they may be able to discourage appropriate——

Mr. HALPERIN. I would assume that these provisions would not be used, and I think it would be inappropriate for them to be used for the committee to try to reverse a decision that has been made on a particular prosecution. As I read the provision, the report would occur only after the decision had been made and would be for the purpose of establishing appropriate procedures and giving guidance and general policy. I don't think it would be appropriate to try to press the administration in a particular instance to carry forward a prosecution.

But I think it—I mean, I don't know what the word "politicize" means in this context. Clearly the administration takes account in these decisions whether the public value of the prosecution outweighs the harm from releasing the classified information, and what I think

these provisions insure is that that decision is made on the basis of a genuine concern about national security and not a concern about concealing improprieties or avoiding embarrassment, and I think for that purpose these provisions are extraordinarily important.

Mr. MURPHY. Mr. Goldman?

Mr. GOLDMAN. Does the ACLU support the provision in Mr. Murphy's bill that requires a bill of particulars?

Mr. HALPERIN. Yes; it does.

Mr. GOLDMAN. I thought at one point you stated that there shouldn't be any changes in existing law other than those which are necessary and dictated by a special circumstance.

What do you feel the special circumstances are here, in this case, that requires a bill of particulars, unlike in other cases?

Mr. HALPERIN. Because of the—are you talking about the——

Mr. GOLDMAN. The names of the witnesses that will be used in rebuttal.

Mr. HALPERIN. Are you talking about section 111? There are two bills of particulars I think required by this bill. One is section 107 and one is section 111, and I have a different answer depending on which of the——

Mr. GOLDMAN. Well, answer both.

Mr. HALPERIN. The section 107 one I think has to do with reciprocity; namely, that where in the pretrial conference the defendant has to explain how he intends to use the evidence in order to win the argument about relevance, the Government should be required to explain its theory in relation to that information. I think it is a form of reciprocity.

Mr. GOLDMAN. Well, wouldn't that be answered in the requirement that the Government has to state how it will rebut the specific information that it doesn't want to be disclosed?

Mr. HALPERIN. No; because that only occurs if the Government loses and the information is going to be introduced. This is reciprocity for the purpose of the hearing to determine relevance which would occur prior to the decision by the court as to whether to introduce the material.

Section 111 is in fact a new provision, and if the Government had any theory of reciprocity it wanted for this provision, I think that would be appropriate to discuss. I was glad to see the Justice Department endorsing the provision this morning. It removes what in my experience is an enormously unfair procedure which arises in trials in which there are large quantities of classified information at issue. The defendants have no way of knowing which information the Government will rely on, and here is a case where I could tell you from my personal experience, the notion that trial judges will always issue orders requiring bills of particulars when the defendants feel that the interests of justice requires them is simply not the case.

In both the *U.S.* v. *Russo* case, which I was involved in, and the *U.S.* v. *Humphrey and Truong*, such bills of particulars were not issued, and the defense lawyers were faced with the problem of having to react very quickly at the last minute to testimony drawn from very large numbers of pages.

So I think that this provision is in the interests of fairness. It is a change in the rules in that it directs a bill of particulars in those cir-

cumstances, and I was pleased to see the Justice Department position that it is a fair position and should be enacted.

Mr. GOLDMAN. In your opening statement you said that the Constitution flatly requires that if the defendant is forced to disclose information to the Government, the Government must provide reciprocity. When the ACLU testified before the Judiciary Committee during the 94th Congress on the rape evidence rule, there were a number of objections raised, but none to that point. At no point was there any testimony on behalf of the ACLU that reciprocity was necessary. And, as the bill came out of the committee and went to the House floor, the ACLU gave it full support.

Is it now the opinion of the ACLU that that rule is unconstitutional because reciprocity is not provided for?

Mr. HALPERIN. I think that that is a question I should like to take under advisement, and I would like permission, if I may, Mr. Chairman, since that was not a—that is not a part of the ACLU that I am involved in and I don't know about that testimony, I would like if I may to submit for the record a statement which explains what we see as the difference between the rape provision and the provisions in this bill.

Mr. MURPHY. Without objection.

[The information referred to follows:]

STATEMENT OF ACLU

When Mr. Halperin was before the Committee, he was asked whether the ACLU has insisted on "reciprocity" in its presentation on the rules of evidence relating to rape prosecutions.

The rape evidence bill is not comparable to the legislation now proposed, but it is interesting to note that the ACLU, in testifying about the rape bill, did support a pretrial hearing at which the defense could elicit testimony from prosecution witnesses prior to seeking to elicit such testimony in open court. This pretrial, in camera hearing proposed by the ACLU would have served the same "reciprocity" function of protecting the interests of both the government and the defendant as is served by the procedures in the Committee bill.

Mr. GOLDMAN. Thank you.

Mr. MURPHY. The hearings will be recessed until 1:30 this afternoon. Thank you.

[Whereupon, at 11:44 a.m., the subcommittee recessed, to reconvene at 1:30 p.m., the same day.]

AFTERNOON SESSION

Mr. MURPHY. Ladies and gentlemen, the hearings of the Permanent Select Committee on Intelligence, Subcommittee on Legislation will come to order.

This afternoon's session, our first witness will be Mr. Michael Tigar.

Mr. Tigar is well known for his participation in a number of espionage trials. He appeared before the subcommittee in its earlier hearings on espionage laws and leaks. His testimony then impressed us, and we welcome him back.

Mr. Tigar, please proceed with your statement, unless Mr. McClory would like to say something.

Mr. MCCLORY. I join in welcoming Mr. Tigar here this afternoon.

STATEMENT OF MICHAEL TIGAR, ESQ., TIGAR & BUFFONE

Mr. TIGAR. Thank you, Mr. Murphy, Mr. McClory.

I have a prepared statement which I have furnished to the committee, and I will not tax your patience or burden the record by reading it to you.

Mr. MURPHY. Without objection it will be ordered.

Mr. TIGAR. I would like it made a part of the record, thank you very much, Congressman.

[The prepared statement of Michael E. Tigar follows:]

PREPARED STATEMENT BY MICHEL E. TIGAR

I appreciate the opportnuity to appear again before the Committee now that the draft legislation has been prepared. I will not repeat the observations of Morton H. Halperin, with most of which I agree.

I have viewed these bills from the perspective of a trial lawyer and law teacher. As I said in my last appearance here, any legislation on the use of classified information in criminal prosecutions should be both narrowly drawn and integrated with the existing mechanisms for pretrial rulings on evidence and pretrial determination of disputed issues of law. The bitter experience of other nations teachers us that creation of a special body of law for offenses involving the security or secrets of the State tends to foster repression. The example of the Soviet Union comes readily to mind, but the experience of France is perhaps more instructive: the creation of a special tribunal with special procedures for offenses involving the "security of the State" has contributed to distortion of the criminal process. Judge Learned Hand in *United States* v. *Coplon*, 185 F.2d 629 (2d Cir. 1950), warned against invoking the national security as a reason for limiting a defendant's right to contest allegations against him or her.

Moreover, to the extent that the Committee's objectives can be attained by integrating its proposals into the Federal Rules of Criminal Procedure and the Federal Rules of Evidence, the Congress will have ensured that this legislation is subjected to continuing review by the distinguished lawyers and judges who made up the Advisory Committees on the criminal rules and on evidence by the Supreme Court of the United States, and by committees of the Congress. Such continuing review is particularly helpful when one is seeking, as here, to chart new paths and to bring order out of a conflicting body of case law.

What I have said underlies my support for the concept of H.R. 4736, although not for all of its provisions, and my opposition to H.R. 4745 and to the companion bill in the Senate, S. 1482.

I. H.R. 4736

Section 101 provides an orderly means for determining important issues arising in cases involving classified information. This section should, however, be legislated into existence as a part of existing Federal Rule of Criminal Procedure 17.1, dealing with pretrial conferences. The mandatory provisions of § 101 could then be included, but it would be clear that admissions made by the defendant or his attorney could not be used against the defendant unless reduced to writing and signed. Such a provision would encourage free and open discussion of disputed issues.

Section 102 provides a mechanism for pretrial ruling on the admissibility of evidence as to which the government claims some sort of executive or state secret privilege. Such pretrial determinations of relevancy are to be encouraged. It would be fruitless to hope, and the Committee's bill does not seem to envision, that all relevancy determinations can be made pretrial. Unanticipated lines of cross-examination, to give an example that comes readily to mind, may require rulings during trial. But the procedure outlined in § 102 seems, on the whole, to be fair. I would suggest that the Committee incorporate § 102 into the Federal Rules of Evidence. Not only would this provide the continuing review of which I spoke earlier, but it would indicate to trial judges that relevancy determinations involving classified information are no different from those involving any other sort of proffered evidence. It is not, I trust, the intent of this bill to change the rules of evidence on admissibility. If classified information is relevant

to any claim or defense, or is useful in the cross-examination of any government witness, a defendant has an absolute compulsory process and confrontation clause right to use it. (*See generally* P. Westen, *Compulsory Process*, 73 Mich. L.Rev. 71 (1974); P. Westen, *Compulsory Process, II*, 74 Mich.L.Rev. 191 (1975); P. Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases*, 91 Harv. L. Rev. 567 (1978).) If the government wishes to rely on its privilege against disclosure of such information, the rule under H.R. 4736 continues to be that the government must pay the price in terms of dismissal or an adverse finding as to some issue. Therefore, the procedures outlined in § 102 should be included in Articles 4 and 5 of the Federal Rules of Evidence.

I am concerned about the provisions of § 103. Despite the cautionary language, "that the defendant's right to a fair trial will not be prejudiced thereby," I feel this section may be seen by trial judges as an invitation to restrict the right of cross-examination. Moreover, treating classified information differently from other kinds of evidence enhances the mystique of the classification stamp and therefore inevitably favors the prosecution in a criminal trial. If such restrictions are to be enacted, I would prefer the section to read "the Court shall not grant such a motion of the United States unless it finds that the defendant's right to a fair trial will not be prejudiced thereby." But, as I say, making special rules about classified information runs counter to reason and experience. (*See generally United States* v. *Coplon, supra.*) If any procedure that is outlined in § 103 is to be provided, it should be a part of the Federal Rules of Evidence.

Section 104 does provide for preservation of records by the Court instead of by the government and is therefore preferable to alternative versions. Its terms should be incorporated either into Federal Rule of Criminal Procedure 12 or into the Federal Rules of Evidence.

Section 105 enacts what I understand to be existing federal law. However, for clarity, the sanctions for refusal to disclose in a discovery context should be made part of Federal Rule of Criminal Procedure 16, and those relating to refusal to disclose in a trial context should be made part of the Federal Rules of Evidence. Section 105(b)(3) should, in any case, be clarified to express the Committee's intention that the government may not rely upon any part of the testimony of any witness relating to classified information which the government has refused to disclose.

Section 106 is reasonable, but should be incorporated into the Federal Rules of Criminal Procedure.

Section 107 is also reasonable, but should be incorporated into the Federal Rules of Criminal Procedure.

Section 108 provides for an interlocutory appeal by the United States before or during the trial. All such appeals implicate the defendant's right to a speedy trial. A mid-trial appeal also enhances the classified information mystique I referred to earlier. The bill does not provide for expeditious determination of pretrial appeals, and even the time limits on mid-trial appeals risk meeting the same fate as befell the mandatory time limits under 28 U.S.C. § 1826(b), part of the Crime Control and Safe Streets Act of 1970. All this aside, any additional grant of pretrial appeal rights to the United States should be incorporated into the existing terms of 18 U.S.C. § 3731 and be subjected to similar limitations. That is, the Attorney General should certify to the district court not only that the appeal is not taken for purpose of delay and that "the evidence is a substantial proof of a fact material in the proceeding." Pretrial appeals should be given calender preference in the court of appeals. Most important, the provisions of § 3731 on pretrial release should be followed; that is, if the government wants a pretrial appeal with its attendant delays, an incarcerated defendant must be released on bail. Moreover, it might well promote the orderly administration of justice to give both the prosecution and the defense the right to appeal, perhaps subjecting both of them to the certification provisions now applicable to civil appeals of interlocutory orders under 28 U.S.C. § 1292(b).

Section 109 should be incorporated into the Federal Rules of Criminal Procedure and § 109(b) should contain the caveat that no deletion, substitution, or summarization can be done so as to interfere with the due process, confrontation and cross-examination rights of the defendant.

Section 110(a), providing for rule-making by the Supreme Court of the United States, is a far preferable formulation to the H.R. 4745 provision that the Chief Justice alone make the rules. This well expresses my concern that this legislation

minimally disrupt the existing system for determination of disputed questions, and be subject to continuing review in the same way as other federal procedural rules.

Section 111 should be inserted as an additional subsection of Federal Rule of Criminal Procedure 16 or as an additional sentence in Federal Rule of Criminal Procedure 7(f). I am in favor of the no-delegability provisions of § 111.

The definitional section, § 113, should be integrated into the appropriate federal rules.

H. H.R. 4745 AND S. 1482

Perhaps the key to H.R. 4745's defects is in § 3, which concludes "promote a fair and expeditious prosecution," as opposed to "a fair and expeditious trial." These two bills reflect a lack of confidence in lawyers and district judges, provide unusual and unduly complex procedures to achieve their ends and seriously threaten the right of fair trial.

For example, § 6(c)(2) of H.R. 4745 completely ignores the defendant's right to cross-examination on the bias, interest and prior conduct of a government witness and restricts the use of classified information solely to matters relevant to an element of the offense or to a "legally cognizable defense".

Both bills vest rule-making authority in the Chief Justice of the United States. Not only does this provision eliminate any deliberative function the Supreme Court as a whole might be able to contribute, but it bypasses the function typically performed by Advisory Committees appointed by the Court and dispenses with the oversight function of the Congress.

Section 10 of both bills represent an unconstitutional invasion of the defendant's right of cross-examination, and would thrust an intolerable burden on trial judges. As the Supreme Court said in *Dennis* v. *United States*, 384 U.S. 855, 874–75 (1966): "Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

This point is well made by Dr. Halperin in his testimony, based on experiences which both of us have had in the Federal courts.

Mr. TIGAR. The committee's deliberations and the hearings that I attended earlier are well reflected in the bill that has been introduced as H.R. 4736, and the bulk of my comments have to do with that bill.

Basically, I have no problems with most of the legislative proposals contained in H.R. 4736. But I would urge upon the committee that all of the provisions with respect to pretrial conferences, rulings on admissibility of evidence and the scheduling of discovery in criminal cases could be legislated into the Federal Rules of Evidence and the Federal Rules of Criminal Procedure rather than made a separate part of title 18 or a separate set of legislation altogether. I urge that on the committee for the following reasons.

Some of these procedures are new and untried. By putting them into the Federal Rules you insure first, that on an annual basis these provisions are reviewed by the distinguished law professors and judges who are a part of the advisory committees on the rules; second, the provisions are subject to review by all the Justices of the Supreme Court of the United States in its deliberative function; and finally, if there are necessary changes to be made, the provisions are subject to review by this House, because this House obviously has to pass on proposed amendments to those rules. That insures not only that this House performs the vital oversight function entrusted to this committee and to the Committee on the Judiciary, but that automatically you have the input from those most immediately concerned with the day-to-day operation of this committee.

For example, section 101 of your bill could as well be an amendment to rule 17.1 of the Federal Rules of Criminal Procedure, and so on.

My concern with your bill begins with section 103. That permits the court to order the substitution for classified information of a statement admitting relevant facts, or the substitution of a summary of specific classified information. I grant you that there is the caveat of finding that the defendant's right to a fair trial would not be prejudiced, but I am concerned, for example, about the problem of cross-examination. Where the Government is conducting an espionage prosecution or any prosecution in which a witness is tendered by the Government who has had access to classified information, much of the impeachment material that a cross-examiner will want to use may be classified. That was certainly the case in *United States* v. *Truong*. We have now discovered, Mr. Murphy and Mr. McClory, by virtue of an admission by the Government in the U.S. Court of Appeals for the Fourth Circuit, that the Government withheld from us Jencks Act material on the Government's principal witness relating to her movements in Paris during a critical time.

No one but an advocate knows how to use information about what precisely a witness did. This was especially true in the *Truong* case, where the transmission of classified information constituted the gist of the alleged offense. I do not say that this withholding of information was intentional, but the CIA was telling the Justice Department that they had everything, and that turned out to be not quite true.

Imagine the situation in which the trial judge is confronted with language like section 103, and the Government, ex parte and in camera according to your bill, urges the court, "After all, this isn't really going to be terriby helpful to the defense, you can furnish them with a summary of the reports the witness filed at a prior time." Imagine the trial judge trying to make that determination basically in ignorance of what the defense strategy is and without the benefit of an advocate's view of the trial. That is my concern with section 103. The rest of the procedures for reviewing these determinations provide ample protection for the Government.

My point is that if the evidence is relevant and admissible, that is, if it meets one of these three standards: It is either in support of the prosecutions theory, in support of the defense theory, or usable for cross-examination or impeachment, then it ought to be turned over. If it doesn't, it needn't be turned over.

I welcome the approach in section 105 with respect to sanctions when the Government refuses to turn over information. A much better job has been done there than in the bill that has been introduced as H.R. 4745 and the Senate bill. I would urge that 105(b)(3) be clarified to express the committee's intention that the Government cannot rely on any part of the testimony of any witness relating to classified information which the Government has refused to disclose. I think it is your intention not to let the Government introduce the direct testimony of the witness, for example, and then not produce usable cross-examination material.

With respect to section 108, this is not the first time this House has confronted the problem of giving the Government a right to interlocutory, pretrial appeal or with the problem of expeditious appeals in

proceedings in criminal cases or ancillary to criminal cases. Most of those legislative efforts, in my experience, have not worked in the way that the House wanted them to work. In the Military Selective Service Act of 1967 you tried to provide docket preference for Selective Service cases and nothing came of it. The courts ignored what both Houses of the Congress said. In 28 U.S.C. 1826, Organized Crime Control and Safe Streets Act of 1970, you provided for docket preference and a 30-day time limit on appeals in contempt matters, where the contempt occurred before a grand jury. The courts of appeals simply ignored this. I know of no case in any court of appeals in which the court said, "We have to get our opinion out in a hurry because the Congress told us to."

I don't know what to do about that. You can't ask the judges to hold themselves in contempt for violating the law, but it raises a problem.

Therefore, I approach these interlocutory appeals warily. If you want to do this, you cause minimal disruption to the system and create a substantial disincentive for the abuse of this power if you make section 108 a part of existing 18 U.S.C. 3731. That section provides for the Government's right of appeal in criminal cases generally. Specifically, and as an example, it provides for interlocutory appeals on search and seizure matters where the judge has suppressed some evidence. If you integrated your procedure into section 3731, you add, first, that the Attorney General would have to certify, as in the pretrial interlocutory appeal on motions to suppress, that the evidence is a substantial proof of a fact material in the proceeding, and that the appeal is not taken for purposes of delay. That would have some disincentive for frivolous appeals.

Second, you don't have a time limit under 108(b)(1) for an appellate decision on a pretrial appeal. You just provide the appeal has to be taken within 10 days. Now, section 3731 requires that a defendant be released on bail when the Government takes a pretrial appeal after a motion to suppress. All constitutional speedy trial, and serious Speedy Trial Act problems aside, the quid pro quo has to be that if the Government wants a pretrial appeal on one of these issues, it has to let the defendant out on bail because it is not fair to have an incarcerated defendant while the Government exercises rights of appeal.

Espionage is perhaps the most serious crime to which this bill would apply. This will raise the issue of an espionage defendant being out on bail. Justice Brennan, in releasing David Truong, pointed out the constitutional standards there. I think you will find in a review of history that espionage defendants tend to make fairly good bail risks as a matter of fact, for all sorts of reasons. Sometimes in Soviet cases it is because their Government guarantees that they are going to be there, and their Government doesn't want to provoke an international incident. In other cases, the watchfulness of the FBI it seems to me is going to be your guarantee.

I am left then with 108(b)(2) which provides for an interlocutory appeal during the trial. I don't know what one does if the court of appeals simply doesn't decide within 4 days of the argument, and a jury is waiting to hear further evidence. Although this is not in my prepared statement, one might provide that if the court of appeals

hasn't decided within the 4 days, the trial judge's order shall be final as against the Government and the trial must proceed. Serious constitutional questions are raised by interrupting a jury trial at all, as well as serious speedy trial questions if these delays become too cumbersome. I would hate to see a delicately worked out mechanism falter because the courts of appeals, as they historically have, don't do what they should.

Section 110(a), regarding the Supreme Court's rulemaking authority with respect to protection of documents, is far, far preferable to the H.R. 4745 procedure and the Senate bill procedure that have the Chief Justice of the United States making rules. The Supreme Court itself is an unrepresentative institution. The Chief Justice at any particular time may be of one political persuasion or another, and the committee has done well in making the provision of the rules subject to the same process that applies to the civil rules, criminal rules, and rules of evidence. In those instances the Supreme Court, as a deliberative body with advisory committees, makes the determination. The history of those rules and their operation and practice has shown the wisdom of providing the full Court with input from the legal profession.

Mr. Chairman, members of the committee, H.R. 4745 is a bad bill. I regret very much to say that I can't find anything good to say about it except where its language happens to track the language of H.R. 4736. H.R. 4736 at least reflects a trial lawyer's judgment and the hearings that have been held here and is based on the finest traditions of the deliberative function of the Congress. H.R. 4745 is the Justice Department's bill and it reflects Justice Department bias. For example, under section 4(a)(iv) of H.R. 4745, a protective order can require security clearances for persons having a need to examine information, which gives the court control over who is going to participate in the defense of a criminal case.

Now, I know that has been done. Some lawyers have been willing to go through the clearance process as a predicate to their representing a client and have had the members of their defense team go through the clearance process. I think that interferes with the defendant's right to counsel of his or her choice.

Section 6(c)(2) provides that unless the court makes a specific written determination that the information is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence, the information may not be disclosed or elicited at a pretrial or trial proceeding. That is the standard.

Mr. Chairman, that is unconstitutional. Any Supreme Court you want to choose would invalidate that in a smooth running minute, and I mean from the time of John Marshall down to this good day. It ignores the fact that information which isn't relevant to an element of the offense or to a specifically cognizable defense may nonetheless be producible by the Government and usable in cross-examination of a witness for bias or prejudice.

Mr. McCLORY. I thought we had testimony earlier that in the rape case we amended the law with regard to the manner of proof and limited the defendants with regard to——

Mr. TIGAR. Unchastity.

Mr. McCLORY. Evidence against the victim, that we were able to modify by statute the rules of evidence, and that, consequently, we could do the same thing here by adding the word "material" as well as relevant and material.

Are we talking about the same thing?

Mr. TIGAR. Congressman McClory, we are talking about the same kind of issue. Let me try to say what I perceive to be the distinction between those two cases.

Historically, the defendant's right to cross-examine the prosecutrix as to prior acts of unchastity in cases involving unconsented sexual contact has been one of those mutants or spores in the law. Prior unchastity is not, strictly speaking, relevant to the question of whether on a particular occasion defendant forced his attentions on the prosecutrix. The legislation with respect to that subject, therefore, is a kind of codification of an "other crimes" or "reputation" question.

Mr. McCLORY. You don't think it is a valid analogy then.

Mr. TIGAR. No, I don't. What we are speaking of here is the question, for example, of whether or not a Government witness has on a prior occasion deliberately falsified records or testimony with respect to the conduct of somebody else. Now, that prior instance of falsehood may have involved some covert mission on which the witness was engaged, but that prior willingness to put aside regard for the truth in favor of doing what one's Government says is the sort of relevant information which the Supreme Court has said you have a constitutional right to make inquiry into.

Mr. McCLORY. Well, when I read Mr. Heymann's statement that he delivered before the committee, I questioned whether or not we had the right to add words into a statute which would change the measure of proof, and yet he spoke very convincingly in support of it.

But you question, I mean, you just think the Supreme Court would throw that out as unconstitutional.

Mr. TIGAR. The leading cases on the defendant's right to disclosure of information relating to a witness's propensity to tell the truth, and a witness's bias and prior record were authored by Chief Justice Burger himself.

Mr. McCLORY. So you think we should just omit the words "and material"?

Mr. TIGAR. I don't think you should pass H.R. 4745 at all, to be frank.

Mr. McCLORY. But on the precise point to which you are addressing yourself, your statement is that adding the words "and material" makes the law unconstitutional, at least that part of it.

Mr. TIGAR. No. Information may be immaterial to an element of the offense or a legalliy cognizable defense, but still relevant to the bias or prejudice of a witness under cross-examination. You would have to add words to that effect.

I cite in my statement Peter Westen's article in Harvard Law Review, "Confrontation and Compulsory Process" and his two prior articles on compulsory process. I don't mean to get everybody reading Law Review articles, but Professor Westen has done an admirable job of summarizing the law in those articles as well as arguing his position. Maybe this Harvard article was published after Mr. Heymann left

Harvard and came to Washington, so it didn't come across his desk. But it takes a position that is very different from what he took before this committee.

This is by no means an exhaustive list, but both the Senate bill and H.R. 4745 amend the Jencks Act. Mr. Halperin was here this morning and recounted in his prepared testimony some reasons why that is unsatisfactory. That recounting was based on conversations that he and I and some other lawyers have been having over the last several months as we have been thinking about these problems in an effort to be useful to the committee if called upon, so I won't repeat it.

The cross-examination of Government witnesses is not only a defendant's sacred right, it is the most important part of a criminal trial as far as I am concerned, and limiting the Jencks Act in this way essentially imposes the trial judge's tactical judgment on the advocate's tactical judgment. After all, a trial is not strictly a rational process in which you count up a bunch of facts. The demeanor of the witness, as the witness is being taken through even prior consistent statements, may be relevant to the jury's determination. Little changes in wording and nuance between the witness's prior consistent statement and what the witness says on the stand may be relevant in the hands of a skillful advocate.

That, it seems to me, is why this section is unwise, and may raise some constitutional problems to the extent that one regards the Jencks Act as based on the *Jencks* decision, which has a constitutional as well as Federal supervisory power footing.

That is the extent of what I came prepared to say. I would be pleased to answer any questions that the members of the committee might have.

Mr. MURPHY. Mr. Tigar, sections 8(b) and 8(c) of the administration bill would allow the court to waive, when classified information is involved, the "Rule of Completeness," rule 106, and the "Best Evidence Rule," rule 1002.

Could you describe the practical operation of these rules and comment on the administration's proposal to change them?

Mr. TIGAR. Yes. The first thing that this does, Mr. Chairman, is to perpetuate the mystique of the classification stamp. One has a hard enough time in a criminal case when ordinary citizens see that classification stamp and don't realize everybody in Government who is anybody has got one. That is the first problem.

Let me turn to the second problem. I am not saying that I don't trust my Government, but the kinds of cases in which you are likely to need these procedures are precisely the ones in which there is great temptation for the Government counsel, as well as defense counsel, I suppose to overreach because of the importance of the issues. That is why any departure from a sort of common law adversary process bothers me. The rule of completeness is a part of the adversary process. It lets opposing counsel insist that a misleading impression not be created. Particularly 8(b) seems to involve an in camera determination so that opposing counsel may not even see what has been deleted. You don't even have the in camera protection of the adversary process.

With respect to the waiver of the best evidence rule, Mr. Chairman, I assume you are familiar with that old saw which states there are no

degrees of secondary evidence. This means that you could have a witness get up and tell you what was in the document, or photograph, and then you would try to cross-examine that witness about the contents of this document or photograph and thereby try to establish what was in it.

Imagine, Mr. Chairman, if we were to take H.R. 4745, and tear it up. Throw it away. There are no originals, no xeroxes, and we were to get Congressman Rodino in here, and you were to conduct his direct examination of what is in the bill and I was to cross-examine him. It would be like three blind men trying to tell you what an elephant looks like. I don't think any of us in this room would have a very good idea of what was in there by the time we were done.

That is the practical problem with that. And if you assume that the Government witness on direct examination who is telling you what is in the photograph or who is providing the information has a motive to kind of twist the facts because he works for the Government, or to color his testimony in a particular way, the problems are enhanced.

Mr. MURPHY. Both bills authorize the court, once it has found evidence containing classified information to be admissible, to require deletions or summaries upon Government request if it finds that the defendant's right to a fair trial will not be prejudiced. You indicated opposition to these provisions in your statement. Doesn't the comment "if a defendant's right to a fair trial will not be prejudiced" sufficiently protect the defense interest?

Mr. TIGAR. First, Mr. Chairman, I don"t believe so because I am opposed in principle to treating classified information differently from all the other kinds of information that come into evidence in a trial, such as priest-penitent privilege information, lawyer-client privilege information, or trade secret information which may involve millions and millions of dollars. If it is relevant and material to an element of the offense or to a defense or for cross-examination purposes, then it should be turned over. If it is not, it shouldn't. And the principles shouldn't be any different for classified information. I see no principled ground on which to do that.

Second, once again, you are asking the court ex parte and in camera to summarize information which is going to be used by an advocate, and over and over and over again I think we have found that trial judges simply can't perform that function. Trial judges can't put themselves in the shoes of the advocate in a way that is going to be fair to a defendant.

This isn't simply my view. The Supreme Court said this in *Dennis* v. *United States*, at 384 U.S. 855 at pages 875 and 876. A number of trial judges have said this with respect to requests that they review grand jury testimony and pick out what would be useful for cross-examination.

The collective experience of lawyers and trial judges and people that work with this should warn us against any such thing.

At the very least, it seems that if you are going to have such a procedure—and as I say, I am unalterably opposed to it—that you should change the language as I have indicated to say that the motion shall not be granted unless the court finds the defendant's right to a fair trial will not be prejudiced thereby. That, coupled with the right to

have a hearing, would mitigate the rigors of this section, and would put the burden of proof where it belongs. That is, if you are going to meddle with established rules, then the burden ought to be with the people that want to meddle with it to establish their case.

Mr. MURPHY. Mr. McClory?

Mr. MCCLORY. I certainly can't accept your thesis that national security, classified, secret information relating to the whole survival of the Nation can be placed in the same category with privileged information or privileged statements such as communication between doctor and patient, lawyer and client and so on as you just now indicated. It seems to me that there is a very sharp distinction, and a much higher importance must be given to classified information which impinges upon our national security.

Consequently, I think that to try to amend the rules of court or to embody in the rules that which has been held in court cases would be entirely unsatisfactory as far as the objectives of the work of this committee and the objectives of the Justice Department, and for that matter, the objectives of defendants' interests, as expressed by Mr. Halperin, of the ACLU, are concerned.

Mr. TIGAR. Congressman McClory, the committee can change the rules of evidence and the rules of criminal procedure in any way it wants. The mechanism I propose for whatever change you do make doesn't have anything to do with the contents of the rules.

Mr. MCCLORY. We don't change the rules. The rules of court are not established by the committee and by the Congress. We sometimes give legislative sanction to rules of court, but we now don't modify rules of court by statutory enactment.

Mr. TIGAR. You have the present statutory power, I believe, to enact amendments to the rules if you decide to do so. The usual procedure is that you simply approve or disapprove them, but I can think within the last 2 years of several modifications that you have made to the rules of evidence and the rules of criminal procedure by legislative action.

But I think it is true, and I say this with great respect, that we do disagree, but not to the extent, perhaps, that your interpretation of my remarks might have suggested.

Yes, national security concerns are more important than lawyer-client concerns. The Latin maxim is *salus reipublicae suprema lex*, which means the safety of the public is the supreme law. That admonition was quoted by Learned Hand, a staunch defender of the national security. In 1950, he wrote that where the rights of a defendant are concerned, this supreme principle must yield, and indeed, in the *Coplon* case he said that it is the test of whether a government is democratic or not. If at the moment the government is going to prosecute one of its citizens it is unwilling to take the wraps off whatever secrets may be relevant to the elements of the offense, or to a defense, or to a procedural protection such as the disclosure of wiretapping, or to cross-examination, that the government is not democratic. I cite the *Coplon* case in my testimony. I think I cited it last time. It is a wise and penetrating discussion. It has been cited with approval by the Supreme Court, and nobody has ever done better than that at setting out the relevant considerations.

So in sum, if we have on the one hand this important national security interest, and if we have on the other hand these irrefragable rights of a criminal defendant, the question isn't so much, "How are we going to stack them up?" The question is: "Procedurally, how do we reach an accommodation?"

I think 4736 tries to do that, and the reason I suggest that we treat this accommodation in the same way that we treat lawyer-client privilege questions is I want to give trial judges confidence and lawyers confidence to work and make these procedures work. I want to suggest analogies to them, as well as not creating a sort of mystique of the classification stamp.

Mr. McCLORY. Well, I am encouraged by your support of H.R. 4736, and I was merely questioning your oral statement that you question the need for either one of the bills, as I interpret it. I would merely point out that there is a strong demand for some legislation. There is a general recognition that some prosecutions have been aborted by a defendant's claim that only by revealing classified information at a public trial could he put forth a defense, and consequently the problem is presented legislatively to find a solution to protecting the national security interests and at the same time prosecuting wrongdoers, whether they happen to have been former CIA agents or not.

Mr. TIGAR. To the extent that these bills attempt to establish procedures to make sure that prosecution decisions are made on the merits as opposed to for other reasons, they have merit. My suggestion that you integrate the procedures with the Federal rules is not designed to deprecate the importance of the bills. It is designed to say that I have confidence in the ability of trial judges and the legal profession and the Supreme Court, as well as this House, to work these procedures out and to suggest needed changes. That really is the purpose of what I was saying.

Mr. MCCLORY. Do you feel that existing discovery procedures are adequate to a plaintiff or defendant to determine the scope and extent of classified information which might be required either in the prosecution or the defense?

Mr. TIGAR. Absolutely not, Mr. McClory. I think that by and large the courts have done fairly well in protecting the Government's interests. Judges as a matter of course hold a pretrial conference and issue all sorts of protective orders about how you can't use the information. One of the positive features of 4736 is that it imposes a discovery obligation on the Government in classified information cases. That protects the rights of defendants to an extent that some trial judges have simply been unwilling to do because they didn't think they had the authority to do it. I welcome those provisions.

It also insures that the classified information doesn't sit back there like a landmine ready to blow up the prosecution midway through because some bureaucrat somewhere decided to protect the prosecuting attorney from knowing something that he should have known. By putting that discovery obligation on the Government early, you are going to make sure that the prosecutor goes around to the agencies to see what is there and that he doesn't get sandbagged by his own purported friends.

Mr. MCCLORY. I don't think you touched upon this, and maybe it is not an area that you are particularly interested in, but what about the

provision in H.R. 4736 for reporting nonprosecution of cases to the committees of the House and Senate intelligence committees?

Mr. TIGAR. I favor that provision, Congressman McClory. It seems to me that in this field perhaps more than any other, the need for some control first by administrative regulation and second by the oversight function of this House over the enormous discretion that the Justice Department otherwise possesses is terribly important. Depending on what administration it is, a refusal to prosecute may be protecting some big multinational corporation against its misdeeds, may be protecting somebody that overthrew a foreign government, and may be protecting a spy. It may be protecting a leaker that some department head doesn't want to see brought to light. That is why I favor the procedure that you have written in.

Mr. MCCLORY. One more question, if I may, Mr. Chairman, and that is when the defendant raises the issue that he has to use classified information in order to properly present his defense, what do you think about the right of the judge, in the in camera proceeding, not only deciding whether or not that testimony or that evidence might be relevant or relevant and material, but likewise, to determine whether or not it was appropriately classified? Should the judge be authorized to determine whether or not it has been properly classified?

In one bill, I think it is H.R. 4736, we provide that the Attorney General will make that decision, and that's it. H.R. 4745, which you have criticized, leaves that issue up to the judge to decide.

Mr. TIGAR. I think that is irrelevant, Mr. McClory, because as I understand 4736, if the evidence is relevant and admissible it was properly classified.

Mr. MCCLORY. In camera.

Mr. TIGAR. Well, if it is relevant, the defendant can use it. If it is not relevant, he can't use it. That is the determination the trial judge makes. I don't think the trial judge needs to concern himself with the question of whether or not it was properly classified in making that ruling on evidence.

So I don't have any problem with the formulation in 4736. The Attorney General's certification there is simply a stepping stone to get the judge to make a pretrial relevancy determination.

Mr. MCCLORY. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. McClory.

Mr. Tigar, one question. What about applying the statute to offenses that may have occurred in the recent past where the Justice Department is considering bringing action and we pass the statute. When do you think the applicability of the statute should apply?

Mr. TIGAR. I think the statute should apply to all pending cases and all alleged offenses whenever committed if the prosecutions are hereafter brought. There is a presumption that procedural legislation applies retroactively and that substantive legislation applies prospectively. That is a canon of statutory construction, and the fate of adjustments of the statute of limitations, for example, in the criminal code, so as to apply to offenses to which the statute has not yet run indicates that retroactive application wouldn't face any constitutional hurdles in the court.

I must say that if a bill were passed with which I agreed and I were going to represent somebody, I would ask that these procedures be applied, at least the part of them that makes the Government have to tell me things.

Mr. McCLORY. May I ask a question?

Mr. MURPHY. Sure.

Mr. McCLORY. Do you feel that either one of these bills or both of these bills are more beneficial to the prosecution or the defendants?

Mr. TIGER. 4745 is probably a more pro-prosecution bill. It is conceived as such. However, I would venture to say that the cumbersomeness of the procedures that it establishes, and the multipart analysis that somebody inside the Justice Department has come with pose serious problems for both the prosecution and the defense. The more complex you make things in an effort to cover all possible contingencies, the more things slip through the cracks. I think 4736 is sort of a lawyer's bill.

Mr. McCLORY. If we would choose to make the statute applicable only prospectively, you don't question we could do that?

Mr. TIGAR. I have no question that you could do that as well. Of course, a trial judge already, under Federal Rule of Criminal Procedure 17.1, could take a look at this bill and say, well, it doesn't really apply, but I am going to issue a pretrial order that has got everything in 4736 in it, except, of course, the Government's right of appeal, and impose those procedures.

I suspect, as a matter of fact, that you would find a lot of trial judges doing that simply because they don't want to make a misstep in handling cases that are as important as these kinds of cases.

Mr. McCLORY. With respect to the interlocutory appeal, you only oppose the interlocutory appeal authority with respect to decisions that are made during trial. Pretrial you have no problem there?

Mr. TIGAR. I have no problem with that provided it is made a part of 3731, which requires that the defendant be released. I think you have serious speedy trial act problems having an incarcerated defendant sitting around cooling his or her heels while the Government winds its way up to the Court of Appeals.

Mr. McCLORY. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. O'Neil.

Mr. O'NEIL. Mr. Tigar, H.R. 4745 proposes a standard of relevance to which you have earlier referred, at section 6(c)(2).

Mr. TIGAR. Yes, sir.

Mr. O'NEIL. And the Government has described that section as applying the standard explicated in the *Roviaro* case. They have also said that even if 4736 were to become law, they would argue that a *Roviaro*-type standard ought to be applied in these kinds of situations, that is to say, that the Government ought to have at least as much protection for classified information as the courts have given a Government informant.

Would you comment on that? I mean, their contention is that this standard would arguably apply even today.

Mr. TIGAR. I see. That is crackpot. With all due respect to the Department of Justice, that really is lunacy. The *Roviaro* case deals with the question of when the Government must reveal the name of

an informant who is not a witness at the trial, and the Court held that, in a decision that has spawned as much appellate litigation as any decision of the Supreme Court that I know about, the disclosure must be made at least if the informer was a witness to the offense itself.

Roviaro has nothing to do with the admissibility in evidence of a particular document or other item of evidence, or the testimony of a witness at trial. At trial, if a witness is proffered by the Government, that witness may be cross-examined not only as to an element of the offense or a legally cognizable defense. That witness may be cross-examined as to motive to falsify, bias, prejudice, prior inconsistent statements, any deal that the witness has made with the Government and so on. Those standards are explicated in cases that are relevant to that question, of which *Roviaro* doesn't really happen to be one, such as *United States* v. *Giglio*, *Davis* v. *Alaska*, and *Brady* v. *Maryland*. Those cases, decided by the current Supreme Court, have to do with the standard of what is admissible in evidence.

So to the extent that *Roviaro* is being relied upon as a blanket standard for introduction of evidence, that is simply wrong.

You could have a *Roviaro* standard with respect to the disclosure of an informant whose identity or activities may be classified, but that doesn't have anything to do with disclosing or eliciting at a trial proceeding.

Mr. O'NEIL. And one other thing. The two bills also differ, and Mr. McClory has alluded to this several times, at the point at which the trial court sees either, in the case of 4736, an affidavit or certification from the Attorney General as to the classification of material or in the case of 4745, an explanation, a written explanation of what is classified and why it is sensitive. They differ in when the trial court sees this. In 4736 it is provided after the judge makes any determination of relevance, use or admissibility. In 4745 it is provided contemporaneous with any request the Government has for deliberation by the judge on those issues of admissibility, relevance, et cetera.

What is your opinion concerning the two approaches?

Mr. TIGAR. In every case involving the potential use of classified information, a pretrial conference is a good idea and there is no constitutional problem with having it in camera. A judge doesn't need an affidavit early on about why the material is classified or what importance it has. The fact is that the information is classified and somebody cares about setting these questions and so a conference should be held.

In 4736, the affidavit applies only in a specific, limited situation where the judge has ruled on admissibility and where the Government wants to substitute a summary or a stipulation. I am opposed to any such substitution procedure, but at least if you are going to have one, the inclusion in 4736 of the affidavit provision makes the providing of that affidavit a kind of hurdle that the Government has to jump over, and to that extent fulfills some function that is relevant to the trial process.

I don't really see why there is an affidavit procedure in 4745. It seems to me that somebody began to write a bill about why things are classified, and then someplace in the halls of the Justice Department it collided with a bill about pretrial procedures, and this is what happened.

Mr. O'NEIL. Well, the Government contends that it would be helpful to them and to the courts, more often to the court, if the court were fully apprised of all the circumstances of the matter at issue when it goes to determine such matters as whether or not a substitution is appropriate, or a stipulation. If it realizes that the only thing at issue is whether or not, say, the name of an agent, of an intelligence agent will be included in what is provided to defendant, then the court can very easily make that kind of determination, and therefore all these matters ought to all be thrown together, whereas the approach of 4736 is that the judge doesn't see any certification until he actually determines beforehand whether it is relevant or admissible.

Mr. TIGAR. Sure. Well, the only purpose of the affidavit in 4745 is to scare the hell out of the district judge and to make him or her think that the information is so important that if she or he makes a misstep on the defendant's side as opposed to the prosecution's side irreparable damage will be caused to the country.

I don't mean to be uncharitable in ascribing motives to the authors of the bill, but I really don't see any other purpose for putting the affidavit provision in section 6(b) of 4745.

Mr. MURPHY. Ira?

Mr. GOLDMAN. I wanted to clarify one thing in talking about the Roviaro standard "relevant and helpful," or relevant and material." At one point a little earlier you made a flat statement that if professed evidence is "relevant material," it must be released to the defendant. If it is not, it doesn't have to be.

Now, did you mean "relevant and material" or did you mean just "relevant"?

Mr. TIGAR. No; I meant "relevant and material" because I don't have any problem with the use of both of those standards as I believe them to be defined by the text writers. Professor Morgan at Harvard used to say that material meant having some relationship to the case, and relevant meant tending to prove a particular proposition in the case. I don't really understand that distinction, but you can use both words if you want. It doesn't bother me.

The language I have trouble with is what followed: "Relevant and material to an element of the offense or a legally cognizable defense." Information can be relevant and material and therefore admissible under the Federal Rules of Evidence which says that, prima facie, all relevant evidence is admissible, without being relevant to an element of the offense or to a legally cognizable defense. It can be relevant to the state of mind of the witness. It could be relevant to the witness's bias, relevant to prejudice, relevant to some deal he or she made with the Government, and so on. These are examples of considerations I mentioned before.

Mr. GOLDMAN. You obviously are aware of the background of the rape evidence rule and as to why there was a call for setting up such a rule.

Do you feel that that is intended to protect the victim, or is it prejudice to the fact-finding function of the trial?

Mr. TIGAR. Prejudice means prejudice to either side of the lawsuit not to the witness. There is no privilege against being asked embarrassing questions. Professor Greenleaf so suggested in a treatise in 1870, but the suggestion died without anybody ever seconding it.

The prejudice here is prejudice to the prosecution, that is, asking the prosecutrix about prior unchastity simply inflames the jury against her, and therefore against the prosecution and that prejudicial effect outweighs any relevance that the evidence is thought to have.

Mr. GOLDMAN. Trying to keep the rules as much as they are now, rather than changing them unless there is a good case for it, and looking at the requirement in 4736 that a bill of particulars be supplied to a defendant automatically, unrequested, do you feel that that requirement is necessary; that if a case involved classified information, it necessarily calls on the Government to provide a bill of particulars?

Mr. TIGAR. Yes, I do, for two reasons. First, because it is a quid pro quo. You are requiring the defendant to come forward and give notice of an intention to use classified information, similar to the alibi defense rule applied against defendants. In the alibi defense notice statute, Rule 12.2 of the Federal Rules of Criminal Procedure, there is a quid pro quo. The Government has to come back and say what they are going to use to rebut it.

Mr. GOLDMAN. Well, this bill would require that also, so a bill of particulars in addition to the information that is going to be used to rebut the testimony is necessary?

Mr. TIGAR. That's right.

Mr. GOLDMAN. I mean, it apparently goes farther than the alibi notice rule.

Mr. TIGAR. Let me go on because, of course, the alibi notice rule bill of particulars doesn't really matter provided they provide the information.

The bill of particulars serves a second function, which is to help both sides anticipate the need for rulings on classified information. The bill of particulars circumscribes the Government's proof. It makes sure that the prosecution can't spring unexpectedly. To the extent it provides a road map, it is helpful.

I would have thought that the language was unnecessary when in 1966 Federal Rule of Criminal Procedure 7(f) was amended to change the word "may" to the word "shall" with respect to the provision of bills of particulars generally. Unfortunately that change seems to have escaped the notice of a great many sitting district judges. So I think it is a good idea to remind them of it.

Mr. GOLDMAN. Do you feel that a court can issue a protective order that prevents an attorney from discussing with his client certain matters disclosed to him?

Mr. TIGAR. Absolutely not.

Mr. GOLDMAN. Even if the information doesn't relate to a defense to the charges but rather just to impeachment? Here I am thinking of an alternative to the Justice Department's proposal in the Jencks Act. I understand where through discovery the defense counsel obtains information that it might be necessary to discuss it with a client in order to prepare the defense as to what actually took place, but if it is just for impeachment, is it necessary to have the client take part in discussing that sensitive material?

Mr. TIGAR. Of course it is, and I think that the effective assistance cirle was recognized as far back as the *Scottsboro* case, *Powell* v. *Alabama*, where counsel were not given sufficient access to the defendants to be able to prepare. That is the constitutional side.

The practical side is this: I can't try a case in which somebody's liberty is at stake in which I am called upon to cross-examine a witness with whom the defendant has been intimately involved. I don't mean in a carnal way, I just mean that they know each other real well, and there is a dispute about what was done and what was said, and I can't cross-examine that witness without the active help of the defendant at every stage. Unfortunately what you are going to have in a number of these national security cases, because of their nature, is a lot of one-on-one cases, where it is the defendant's version against somebody else's version as to just how things got to where they were.

Mr. GOLDMAN. One final question. The Government has one problem in espionage cases apparently where one document of, let's say 200 pages, is transmitted to a foreign power, and the Government would like to only put before the jury a portion of that document. Now, one possibility is to only charge the defendant with transmittal of 10 pages of the document. You criticized the Justice Department proposal which would allow only admission into evidence of part of the given document. Do you think that charging the defendant only with transmittal of part would be a solution, or do you think under the existing rules of relevance and completeness that the Government would be able to only have admitted part of a classified document for admission to the jury?

Mr. TIGAR. I would welcome any procedure that would identify the specific information that the Government thought harmed the national security. I welcome specificity. I am opposed to interfering with the rule of completeness which essentially says to the trial judge, "Look, if it is fair to let the whole thing in, then let the whole thing in." I don't see why you ought to interfere with the discretion of trial judges in that regard.

I could easily see a case in which the Government would charge a person with having transmitted only 10 pages when in fact the whole document was transmitted, in which the introduction of the rest of the document could materially weaken the Government's contention that the national security had been harmed. It is possible to take some language out of context in such a way as to enhance the seeming impact of it on the national security. That again is something that has got to be dealt with on a case-by-case basis. It doesn't seem to me that you can ask yourself a lot of "what if's" and cabin the trial judge's discretion.

Mr. GOLDMAN. Thank you.

Mr. MURPHY. Mr. Raimo.

Mr. RAIMO. Thank you, Mr. Chairman.

Mr. Tigar, in your statement you noted that you favor integrating the provisions of this bill into the Federal rules. Other people have suggested that we postpone the whole legislative process and allow these, in effect, changes in the Federal rules to be made pursuant to the normal procedure in which Federal rules are enacted.

What is your opinion on that?

Mr. TIGAR. I wouldn't be opposed to doing that, but I understand there's a lot of pressure to get a bill, and that pressure is being heard from everywhere. I think therefore that any such suggestion is fruitless. But I don't think you really have to wait for the advisory commit-

tee process. This committee has held hearings and it has heard from and actively sought out people of all different persuasions and all different views. That work is reflected in the various drafts that have been circulated at various times, so that a deliberative process has gone on.

I think you accomplish enough if you integrate them into the rules and then provide automatically thereby that as problems crop up, as unanticipated difficulties with this or that provision are demonstrated to exist, the advising and consulting and amending process could take care of it. I think you accomplish enough if you did that.

Mr. RAIMO. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Tigar, thank you again for your cooperation with this committee as you have done in the past, and I hope in the future.

It is always a pleasure to see you.

Mr. TIGAR. Thank you very much, Mr. Chairman, Congressman McClory. Thank you.

Mr. MURPHY. Our next witness this afternoon is Mr. Michael Scheininger. Mr. Scheininger appeared for the defense in both the *Berrellez* and *Garrity* cases, two prosecutions that helped draw attention to the issue of graymail.

He is accompanied in his testimony by Mr. Thomas Guidoboni.

Mr. Scheininger, thank you very much for appearing today, and gentlemen welcome.

You may proceed.

STATEMENT OF MICHAEL G. SCHEININGER, ESQ., FORMER ASSISTANT U.S. ATTORNEY AND PARTNER, BONNER, THOMPSON, O'CONNELL & GAYNES, ACCOMPANIED BY THOMAS A. GUIDOBONI, ESQ., FORMERLY OF THE DISTRICT OF COLUMBIA PUBLIC DEFENDER SERVICE AND ASSOCIATE, BONNER, THOMPSON, O'CONNELL & GAYNES

Mr. SCHEININGER. Thank you, Mr. Chairman, Mr. McClory.

Mr. Chairman, we have prepared a statement which we would like to submit for the record and particularly in view of Mr. Tigar's testimony, I will only summarize and perhaps read select portions of my prepared statement.

Mr. MURPHY. Without objection.

Mr. SCHEININGER. Thank you, sir.

[The prepared statement of Mr. Scheininger follows:]

STATEMENT OF MICHAEL G. SCHEININGER, FORMER ASSISTANT U.S. ATTORNEY, PARTNER, BONNER, THOMPSON, O'CONNELL & GAYNES

Mr. Chairman, I am honored and privileged to appear today, at the Subcommittee's invitation, to present my views on various bills that have been introduced to deal with the use of national security information in criminal trials. Mr. Guidoboni and I speak on our own behalf as members of the bar who have participated in the defense of criminal cases involving national security.

We know that the various bills now pending in both Houses of Congress are the result of diligent and fairminded efforts to deal with the complex problems of criminal justice and national security. But, we believe that these bills overreact to the actual problems in this area, and that the Adminisration Bill, in particular, unjustifiably interferes with the rights of a criminal defendant.

It is deplorable that the sinister term "graymail" has come to be applied to all efforts to obtain information material to the defense of an accused in a case involving national security. Such discovery efforts, tightly regulated in their scope by the existing Rules of Criminal Procedure, are the ethical obligation of defense counsel and the very essence of our adversery system of justice. That discovery efforts may actually result in disclosure of classified information properly reflects the importance we attach to notions of fundamental fairness in our criminal law. As the Supreme Court stated in *United States* v. *Reynolds*, 345 U.S. 1 (1953):

"(I)t is unconscionable to allow (the government) to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

I do not mean to suggest that serious problems do not exist in the so-called graymail area. Hearings held before various committees of both Houses of Congress have chronicled case histories of abuse. But the primary abuses cited have been the failure of our intelligence agencies to refer matters for prosecution, the absence of inter-agency procedures to handle classified information, over-classification, and timidity on the part of the Justice Department in the face of exaggerated claims that prosecution will result in disclosure of national security information. None of these abuses resulted from deficiencies in the Rules of Criminal Procedure.

I do not believe that the Justice Department can cite any case in which prosecution was thwarted because existing procedures available to the courts were insufficient to protect national security information. The so-called "ITT-Chile" case, in which I was one of the counsel of record, is cited erroneously for this proposition.

That prosecution was initiated and pursued under existing procedures which authorized the judge to: (1) Issue a comprehensive protective order under *Fed. R. Crim. P.* 16(d)(2), limiting access and disclosure of classified information; (2) order that notice be given by the defense of its intention to use classified information; (3) require the defense to demonstrate relevance and materiality of that information at an *in camera* pretrial conference held pursuant to *Fed. R. Crim. P.* 17.1. A series of such *in camera* hearings was held, following which the court ruled that the classified material was relevant and material, and would be permitted to be used at trial. It was disagreement with this ruling that caused the Justice Department to seek review by way of a petition for writ of mandamus. *See Fed. F. App. P.* 21. In denying the petition, the United States Court of Appeals held that the trial judge had "shown a proper sensitivity to the requirements of national security." *In Re United States*, U.S. App. D.C. No. 78–2158 (Jan. 26, 1979). Thus, the "ITT-Chile" case, like many other, albeit more successful, prosecutions demonstrates that the existing Federal Rules of Criminal Procedure are adequate to protect the Government's legitimate national security concerns.

Nonetheless, the Department of Justice has made a case for new legislation on the basis that because existing procedures are discretionary with each judge, the Department cannot know in advance that adequate safeguards will always be imposed. We do agree with the Department of Justice that if mandatory procedures are enacted, the Department will be better able to assure our intelligence agencies that their secrets will be handled in a uniform and predictable manner. We appreciate also the Department's need to insure, by way of pretrial determination and appellate review, that irrelevant, immaterial classified information is not needlessly disclosed. Accordingly, we do not oppose legislation requiring mandatory notice by the defendant of his intention to disclose such information, mandatory pretrial hearings, interlocutory appellate review, and uniform procedures to safeguard security material once it is disclosed. We believe that H.R. 4736, introduced by Congressman Murphy, would properly implement these goals.

What we oppose in each of the Bills is their retreat from the established principle that in a criminal case the government's reliance on national security "cannot deprive the accused of anything which might be material to his defense." *United States* v. *Reynolds, supra. See Jencks* v. *United States*, 353 U.S. 657, 670–71 (1957); *United States* v. *Andolschek*, 142 F.2d 503, 506 (2nd Cir. 1944). By permitting deletions or substitutions in lieu of actual material, these Bills deprive the defense of its right to determine for itself the most effective use of that information. We submit that it is contrary to fundamental fairness to single

out one class of defendants—those charged in cases involving national security—and to erect this barrier to equal justice.

In addition to this common criticism we have of all of the Bills now pending before Congress, we also find particular fault with various provisions of H.R. 4745, the Administration Bill. In the interest of brevity, I will address only our major concerns:

I. PROCEDURES TO OBTAIN PROTECTIVE ORDERS

One of the most dangerous proposals of these Bills is contained in Section 4(b) of the Administration Bill. It empowers a judge to alter, by substitution or summary or even deletion, admittedly relevant and material information without affording the defense notice or an opportunity to be heard. This provision swallows all of the protections provided to the defense elsewhere in the Bill. For example, under Section 6(b) of the Administration Bill, deletions, substitutions and summaries are permitted only after an adversary hearing, prior to which the defense is given sufficient information to enable it to participate in an intelligent manner. There is no legitimate reason why these same protections should not be afforded under Section 4(b).

In addition, we object to Section 4(b)'s limitation of discloseable information to that which is "necessary to enable the defendant to prepare for trial." Under *Fed. R. Crim. P.* 16(a)(1), a defendant is additionally entitled to discover material which is intended for use by the government in its case-in-chief at trial, or which was obtained from or belongs to the defendant. We oppose the attempt to restrict discovery by the deletion of these additional standards.

The Administration justifies this section by arguing that it provides the Court with no different authority than is already provided in *Fed. R. Crim. P.* 16(d)(1). In this context, it should be noted that although when originally promulgated, Rule 16(d)(1) was specifically intended for use in national security cases, *see* Advisory Committee's Note, 34 F.R.D. 411, 425 (1964); *Dennis* v. *United States*, 384 U.S. 855, 875 (1966), there is not a single reported case where it has been so used. Thus, if Section 4(b) merely restated Rule 16(d)(1), it would be at worst superfluous. But a detailed comparison between proposed Section 4(b) and existing *Fed. R. Crim. P.* 16(d)(1) reveals that there are indeed, significant and prejudicial differences. First, Rule 16(d)(1) requires that *any submission* made for consideration by the judge alone, *must be made in writing*. Proposed Section 4(b) contains no such requirement. Second, Rule 16(d)(1) provides that *whenever* the judge grants restricting discovery following an *ex parte* showing, all the written submissions shall be preserved for appeal. Section 4(b), by contrast, mandates such preservation only if relief is granted *and the defendant objects*. Thus, under the provisions of Section 4(b), a prosecutor would be free to make any sort of hyperbolic oral representation to a judge, and there would be no record available for appellate review. Moreover, even where some written materials were submitted, they would not be preserved for review unless the defendant objected to the court's decision. Since, under this section, the defendant is not even entitled to notice that the procedure has taken place, one can only wonder how a defendant ever will be sufficiently informed to make an objection. Thus, proposed Section 4(b), if enacted, would significantly dilute the protections available to defendants under present *Fed R. Crim. P.* 16(d)(1).

II. RECIPROCITY

Sections 5 and 6 of the Administration Bill require a defendant to give notice of his intention to disclose classified information. The defense is also required to detail its use of the information, and to reveal and justify its legal theory in order to demonstrate the relationship between the classified information and the defense case. This complete disclosure must be made at a time when the defendant has not yet heard the case against him and under a statutory scheme which provides him with no reciprocal discovery. We strongly object to this lack of any reciprocity in the Administration Bill.

Reciprocity in discovery is constitutionally mandated. As the Supreme Court stated in *Wardius* v. *Oregon*, 412 U.S. 470, 476 (1973):

"It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

In comparison, reciprocity of two types is provided by Section 107 of the Murphy Bill. Whenever a defendant is required to disclose particular aspects of

his defense, he is entitled to a bill of particulars, detailing related aspects of the prosecution's case. In addition, if the defendant's right to use the classified information is sustained by the trial court, the defendant is entitled to be advised of information and witnesses which the government intends to use to rebut the particular classified information. Reciprocity of this type is constitutionally compelled, and Section 107 of the Murphy Bill substantially complies with this requirement. By omitting any reciprocity provisions, the Administration Bill is constitutionally suspect.

III. EX PARTE REPRESENTATIONS

Under Section 6 of the Administration Bill, in order to obtain an *in camera* hearing, the prosecution is required to "demonstrate in an *ex parte* proceeding that the disclosure of the information reasonably could be expected to cause damage to the national security * * *." In our view, this demonstration is totally unnecessary and is prejudicial to the defendant. It is unnecessary because the trial judge does not need to know the basis for the security classification simply to determine whether or not to hold the hearing *in camera*. It is prejudicial, because the judge is unable to make an intelligent decision without the benefit of the adversary process and in the face of claims of dire consequences by the security agency and the Department of Justice.

While we agree that the prosecution should be required to offer proof that national security is properly invoked, this proof, like any other, must be subject to the adversary process. Only in that way can the prosecution's representations be effectively tested so that the court can make an informed decision. *Alderman v. United States*, 394 U.S. 165, 182-183 (1969). In the absence of a provision guaranteeing an adversary proceeding, we oppose this procedure.

We prefer instead the formulations in Section 102 and 103 of the Murphy Bill. It is provided there that the judge is not to consider the basis for the classification until after he determines that the material at issue is producible. The judge is then permitted to consider the basis for the classification only in determining what form the disclosure shall take. This scheme properly separates the two independent decisions which the court must make, and protects against information relevant only to type and degree of disclosure "spilling over" and coloring the determination of whether the information should be disclosed at all.

We believe that there would be few, if any, occasions when an explanation of the basis for the classification is required in order for the court to make a determination of possible alternatives to full disclosure. A designation of which specific information is classified, and a description of the purpose for which the defendant intends to use the information will likely be the only factors which the judge needs to make his decision. In those rare instances where an explanation of the basis for the classification is necessary, it should be furnished only upon the request of the judge, and only in the form of a written affidavit, so as to be available for appellate review. *See* Part II, *supra* at 6-7. While written affidavits are required by Section 103(b) of the Murphy Bill, the Bill unjustifiably encourages the prosecution to submit such statements on its own initiative.

In sum, while we support the procedures set forth in the Murphy Bill as vastly preferable to those advanced by the Administration, we oppose in principle the notion that criminal trials may contain any *ex parte* proceedings. Protective orders, barring unauthorized disclosure on penalty of contempt would constitute a sufficient safeguard in all but the rarest of cases.

IV. JENCKS ACT

Finally, we wish to address Section 10 of the Administration Bill, which proposes a revision of the Jencks Act. Under the present statute, 18 U.S.C. Section 3500, once a witness has testified on direct examination for the prosecution, the only ground upon which a prior statement by that witness may be withheld from the defense is that the statement "contains matter which does not relate to the subject matter of the testimony of the witness," 18 U.S.C. Section 3500 (c). In these circumstances, the court, after an *in camera* inspection, orders excision of the irrelevant material and production of the remainder.

The proposed amendment would require the court to order the deletion of admittedly relevant matter, if it finds that the matter is classified, the classifica-

tion is justified, and the matter "is consistent with the witness' testimony," Section 10(A). The Murphy Bill contains no such provision.

We object to this attempt by the Administration to tamper with the Jencks Act. The Act, as presently codified, already meets all of the objectives which these new Bills seek to accomplish. It is uniformly applicable in all federal courts, 18 U.S.C. Section 3500(A). It precludes discovery until after a witness has testified, thus preventing premature and unnecessary disclosure, 18 U.S.C. Section 3500(A). It requires the excision of irrelevant matter, 18 U.S.C. Section 3500(C). It permits the prosecutor the option of refusing to produce the discoverable statement, and it provides a hierarchy of sanctions for nondisclosure, which do not necessarily require the termination of the prosecution, 18 U.S.C. Section 3500(D). Therefore, additional legislation in this area in order to deal with national security problems is totally unnecessary.

The proposed amendment would require the deletion of material from a statement, if the trial judge found it to be consistent with the witness' testimony. Demonstrable inconsistency has never been the test for production of Jencks material, and for very good reasons. As the Supreme Court stated in *Jencks* v. *United States*, 353 U.S. 657, 667-68 (1957):

"Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency.

"The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

"Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to his defense. The occasion for determining a conflict cannot arise until after the witness has testified, and unless he admits conflict, as in *Gordon*, (v. *United States*, 344 U.S. 414 (1953)) the accused is helpless to know or discover conflict without inspecting the reports. A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the federal courts and must therefore be rejected."

Although the Jencks Act was intended to limit application of the doctrine established by the court in its decision, the ruling that a defendant need not demonstrate inconsistency prior to obtaining an otherwise producible statement, has not been altered. *See, e.g., Clancy* v. *United States*, 365 U.S. 312, 316 (1961).

In sum, the Administration's proposed amendment to the Jencks Act is nothing more than a naked and unwarranted intrusion upon the defendant's right to obtain relevant material, so that he may effectively confront the witnesses against him, as guaranteed by the Constitution. *See, e.g., United States* v. *Missler*, 414 F.2d 1293, 1303 (4th Cir. 1969), *cert. denied*, 397 U.S. 913 (1970). For all of these reasons, we strongly oppose Section 10 of the Administration Bill.

V. CONCLUSION

In conclusion, we urge this Subcommittee not to be overawed by the so-called graymail problem. Abuses in this area are not the result of deficiencies in the Rules of Criminal Procedure. Existing rules have proved adequate to safeguard national security interests, while at the same time permitting successful prosecutions.

The case for new legislation is that it will impose uniformity and predictability on existing discretionary procedures. But making notice and pretrial determinations mandatory, and affording the prosecution interlocutory appellate review, are the only new procedures necessary to meet these objectives.

To go beyond this, to enact more stringent standards which defendants must meet to gain access to pertinent information, to proliferate *ex parte* proceedings, and to legislate wholesale exemptions to the Jencks Act, is totally unwarranted by the scope of the problem. We urge the Congress to exercise restraint in enacting new legislation which affects the heart of the procedural protections afforded defendants in our adversary system of justice.

Mr. SHEININGER. Mr. Chairman, in a word, having analyzed all the bills, the Senate bill as well as the two that are pending before this

subcommittee, we believe that the bills are, at least in their present scope and form, unnecessary. I believe the bills overreact to the so-called graymail problem, and I believe the bills might significantly disadvantage an accused in preparation and presentation of his defense.

I think it is very unfortunate that this term "graymail" has come to be applied to any efforts to obtain national security information that is relevant to a defense of an accused. Discovery efforts under the present rules are tightly regulated in their scope, and I think it is the ethical obligation of defense counsel, and the very essence of the adversary system, to obtain all relevant facts. That discovery efforts may actually result in the disclosure of classified information I think properly reflects—and I agree with Mr. Tigar—the importance we attach to notions of fundamental fairness.

As the Supreme Court stated in *United States* v. *Reynolds*: "It is unconscionable to allow the government to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

Now, I don't mean to suggest that there aren't serious problems in the graymail area. This committee, other committees of the Congress, both Houses of Congress, have chronicled histories of abuse in this area, but I think if you review those cases of graymail cited there, they consist of the following kinds of abuses: Failure on the part of our intelligence agencies to refer matters for prosecution; absence of interagency procedures to handle classified information; overclassification, as was discussed this morning; and finally, timidity on the part of the Department of Justice in the face of some exaggerated claims that prosecution will result in the disclosure of national security information. These are the abuses which constitute the phenomena of graymail. Yet, none of these abuses results from deficiencies in the Rules of Criminal Procedure. So, legislative efforts to amend the rules is, in my view, misplaced.

I don't believe that the Department of Justice can cite any case, and I don't believe they have cited any case, in which prosecution was thwarted because existing procedures available to the courts were insufficient to protect national security information. That is true also of the ITT-Chile cases in which I participated, and which I described in my statement.

The Justice Department's case for this legislation is made on the basis that because existing procedures are discretionary with each judge, that the Departments of Justice and Defense and so forth, can't know in advance that adequate procedures will always be imposed. It is not a failsafe system, argues the Department of Justice.

I agree with this limited goal of assuring uniform procedures in all national security cases. One advantage of mandatory procedures is that the Department will be better able to assure our intelligence agencies that their secrets will be handed in a uniform and predictable manner. I agree, too, that mandatory pretrial determinations and interlocutory appellate review are legitimate procedures to insure that irrelevant and immaterial classified information is not needlessly disclosed. For that reason, I do not oppose legislation requiring, first, mandatory notice by the defendant of his intention to disclose such

information; second, mandatory pretrial rulings; third, interlocutory appellate review; and lastly, uniform procedures to safeguard material once it has been disclosed.

These four new procedures are the only ones necessary to protect the Government's interest in classified information. To go beyond this risks prejudicing the defendant's rights. Concerning these four procedures, I think H.R. 4736, Congressman Murphy's bill, would properly implement them. I agree, too, with Mr. Tigar's view that the notice and hearing provisions are better integrated into the rules of criminal procedure, and that with regard to interlocutory appeal, the release provision of 18 U.S.C. 3731 should apply.

What we oppose, Mr. Chairman, in each of the bills, is their retreat from the established principle that in a criminal case the Government's reliance on national security, and I quote the Supreme Court, "cannot deprive the accused of anything which might be material to his defense." By permitting deletions or substitutions in lieu of actual material, these bills deprive the defense of its right to determine for itself the most effective use of that information. I submit that it is contrary to fundamental fairness to single out a class of defendants, and by that I mean those charged with cases involving national security, and erect this barrier to their use of information that is material to their defense.

I would like to turn to what we regard as perhaps the most dangerous provision of the administration bill, section 4(b). It is labeled in the bill "Protective Orders," and what it does is it empowers a judge to alter by substitution or summary, or even deletion, admittedly relevant and material information without affording the defense notice or an opportunity to be heard. We submit that this provision swallows all of the protections embodied elsewhere in the administration bill.

Under section 6(b) of the administration bill, deletions, substitutions and summaries are permitted only after an adversary hearing, prior to which the defense is given either a summary of the information or the information itself so that the defense may intelligently participate in this process. There is no good reason, I submit, Mr. Chairman, why the same protections embodied in section 6(b) of the administration bill should not also be engrafted onto section 4(b) of that bill.

In addition, we object to section 4(b)'s limitation of disclosable information to that which is necessary to enable the defendant to prepare for trial. This is only one of three discovery areas authorized by section 16(a)(1)(C) of the Rules of Criminal Procedure.

That rule permits a defendant to gain access to information, not only that is material to a defense, but also, that which comes from the defendant himself, and that which the Government intends to introduce into its case in chief. These two are extremely important provisions which I believe should be incorporated in section 4(b).

Concerning reciprocity, sections 5 and 6 of the administration bill require a defendant to give notice of his intention to disclose classified information. Mr. Chairman, it has already been stated, and we concur, reciprocity is constitutionally mandated, and I will simply quote from the Supreme Court's statement in *Wardius* v. *Oregon*: "It is fundamentally unfair to require a defendant to divulge the details

of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State."

We submit that the reciprocity provisions contained in Congressman's Murphy's bill appropriately meet this constitutional requirement, and that the administration bill, by omitting these provisions, is constitutionally defective.

Under section 6 of the Administration bill, in order to obtain an in camera hearing, the prosecution is required to demonstrate in an ex parte proceeding that the disclosure of information reasonably could be expected to cause damage to the national security. In our view, that demonstration is totally unnecessary and prejudicial to the defendant. It is unnecessary, because the trial judge does not need to know the basis for security classification simply to determine whether or not to hold an in camera hearing. It is prejudicial, because the judge is unable to make an intelligent decision without the benefit of the adversary process, and in the face of ex parte claims by the Department of Justice that dire consequences will take place if material is disclosed. The judge simply can't make an intelligent decision in these circumstances absent the adversary process.

Ideally, the prosecution should be required to offer proof that national security is really involved in order to trigger the other provisions of this bill. But this proof, like any other, must be subject to the adversary process. In the absence of a provision guaranteeing an adversary procedure, we oppose any provision in which the Department of Justice is permitted to make ex parte representations concerning the basis for a classification.

We prefer instead the formulations in sections 102 and 103 of the Murphy bill. It is provided there that the judge is not to consider the basis for the classification until after he has determined that the material at issue is producible. The judge is then permitted to consider the basis for the classification only in determining what form the disclosure shall take. This scheme properly separates two independent decisions which the court must make and protects against information relevant only to the type and degree of disclosure, spilling over and coloring the determination of whether the information should be disclosed at all.

Mr. Chairman, we believe that in fact and in actual practice there would be few occasions when an explanation of the basis of the classification is required for the court to make a determination of possible alternatives to full disclosure. A designation by the Government of which specific information is classified, and a description of the purpose for which the defendant intends to use the information, will likely be the only factors that a judge needs to make his decision.

In sum, while we support the ex parte procedures set forth in sections 102 and 103 of the Murphy bill as vastly preferable to those advanced by the Administration, we oppose in principle the notion that a criminal trial may contain any ex parte proceedings. Protective orders which bar unauthorized disclosure on penalty of contempt would constitute a sufficient safeguard in all but the rarest of cases.

We oppose, too, the administration bill's Jencks Act provisions. Much has been said about the Jencks Act provisions before the subcommittee today, and I won't repeat arguments concerning that. I

simply call to the committee's attention the statement by Mr. Heymann this morning, that in point of fact, the Jencks Act has not really been a problem for the Department of Justice in the area of graymail and national security.

In addition, I point out that the Jencks Act, as presently codified, already satisfies the objectives which these new bills seek to accomplish. Concerning uniformity, the Jencks Act is obviously applicable in all Federal courts. Also, it precludes discovery until after a witness has testified and thus prevents premature and unnecessary disclosure. It requires excision of irrelevant matters. It permits the prosecutor the option of refusing to produce the discoverable statement, and it provides a hierarchy of sanctions for nondisclosure which don't necessarily require the termination of the prosecution.

In sum, we believe that the Jencks Act meets almost all of the interests of the Department of Justice.

In conclusion, I urge this subcommittee not to be overawed by the graymail problem. The past abuses in this area have not resulted from deficiencies in the Rules of Criminal Procedure. The existing rules have proved adequate to safeguard national security interests, while at the same time permitting many successful prosecutions.

The case that the Department of Justice has made to this subcommittee for new legislation is that, by imposing a nondiscretionary system, uniformity and predictability will be enhanced so that people at Justice and Defense will have a better idea of what is likely to come out in a criminal trial. The only changes in present rules needed to accomplish these ends are enactment of the notice, the pretrial hearing, and the interlocutory appellate review provisions of these bills. These changes alone will satisfy all of the objectives which the Department of Justice seeks. To go beyond that, and to enact more stringent standards by which a defendant can gain access to pertinent information, to proliferate ex parte proceedings as the administration bill does, to make wholesale exemptions to the Jencks Act as the administration does, these provisions are unfair to the defendant and totally unwarranted by the scope of the problem. We urge the Congress to exercise great restraint in this area.

Lastly, I would like to address an issue discussed earlier today: What is the proper standard by which a defendant can gain access to classified information at various stages of the trial? Mr. Heymann advocates the standard embodied in section 6(c)(2) of the administration bill. But, is the appropriate standard "relevant and material"? Or, is the appropriate standard "relevant and helpful"? Should we simply say "relevant" as distinguished from "material," and if so, how does all this affect disclosure procedures?

I want to re-state a point made by Mr. Tigar. These phrases, "relevant and material", "relevant and helpful," are only half of the inquiry. You have to see it as a double-barreled inquiry. The question is, "relevant and material" to what? "Relevant and helpful" to what? It can be relevant and helpful to the preparation of the defense.

Now, that is the discovery standard embodied in rule 16—the "preparation of the defense." Obviously, something that is relevant to the "preparation of the defense" is a lesser standard, a lesser burden on the defendant, than demonstrating that information is material and

relevant to a "legally cognizable defense," which is more of an in-trial standard.

So you can have relevant and helpful to the "preparation of a defense"; you can have relevant and helpful to "an element of the offense"; and, as Mr. Tigar stated, you can have relevant and material or relevant and helpful to impeachment—the issues of bias and prejudice. And we might add also, the standard must be capable of being applied to efforts to obtain information for purposes of motions to suppress evidence, or to motions to sever counts of an indictment, or motions to sever defendants from an indictment.

So, this is a complex issue with greater ramifications than those addressed by Mr. Heymann. The appropriate inquiry is to look at both sides of this standard issue. The *Roviaro* case, as Mr. Halperin and Mr. Tigar agreed, is not appropriately analogous to the issue before this committee. I think that the statement made upon the introduction of Congressman Murphy's bill, that nothing in these procedures is intended to change current standards of admissibility in a criminal trial is the appropriate legislative history for these bills. And I think the committee should be very cautious and make it clear that no change in standards is anticipated by this bill.

We welcome questions.

Mr. MURPHY. Thank you very much.

Mr. Guidoboni, would you like to comment?

Mr. GUIDOBONI. I really don't have too much to add to the testimony of Mr. Halperin, Mr. Tigar, and Mr. Scheininger. I agree with them on many of these matters.

I would like to make a general comment, however. One thing I noticed when Mr. Heymann was testifying this morning, and he made the point a number of times, that, if you put this provision in you are going to have a lot of arguments and a lot of rulings and a lot of appeals. These comments really demonstrate the difference in our approaches.

We have an adversary system of justice in this country, and arguments and rulings and appeals are what the adversary system is all about. It is both sides advocating and the judge reaching the best decision. Hopefully the advocates are shedding light and not just heat on the controversy.

Mr. Heymann seemed disinclined to approach things that way, but that is the system we have in this country. We don't have an inquisitorial system where the magistrate calls people in, takes a deposition and then makes a decision. We have a totally different situation and I am sorry to hear Mr. Heymann say that he felt it was something to be avoided.

The adversary system is what we are all about. It is what defense lawyers and prosecutors do every day down in the courts. They argue, get judges to rule, and then the side that loses may appeal. I think that it is just normal to the system. And while other people may think that is not the right system, it certainly is the one we have had in this country for 200 years.

Mr. MURPHY. Mr. Scheininger, in your statement you suggested that in the ITT/Chile case, the district court had ruled the disputed information to be relevant and admissible and the Government sought

mandamus to reverse this ruling. The Government, on the other hand, suggests that it was the district court's refusal to make such a ruling before trial that was the subject of the mandamus petition.

Could you clarify this discrepancy?

Mr. SCHEININGER. Mr. Chairman, I think that review of the transcript in that case, the transcripts which are public, would reveal that what happened was that the Department of Justice asked the trial judge, Judge Aubrey Robinson, just 2 days before trial to impose a series of protective orders and procedures on the defense. The defense did not object to those procedures. We didn't object to giving notice of our intention to use certain classified information, and we didn't object to the trial judge requiring us to make a profier of how that evidence—which embodied national security secrets—how that evidence would be material to our defense.

Having heard that proffer, the trial judge ruled that he would permit the defense to use the national security information in the defense of Mr. Berellez. At that point, the Department of Justice, with many hurried phone calls back to Mr. Heymann and many interruptions in the course of the trial, stated that Judge Robinson's ruling was, A, erroneous on the merits; and B, that the protective order that the judge had agreed to issue wasn't sufficient.

I think that the purpose for the Department of Justice's allegation that the protective order was not sufficient was simply to give them a better vehicle by which to seek mandamus. When that issue got to the Court of Appeals, the District of Columbia Circuit stated without qualification that, concerning procedures to protect national security, Judge Robinson had shown very appropriate sensitivity.

The primary issue concerning which the Department of Justice sought appellate review, was the substantive ruling on the merits about whether or not we could use this information in Mr. Berellez's defense. They didn't agree with Judge Robinson's ruling concerning that issue, and that is why they sought mandamus.

Of course, that is not an appropriate issue for mandamus. You don't go to the court of appeals and interrupt a criminal trial because you don't like the way the judge ruled on an issue of evidence, and accordingly the Government's appeal was dismissed.

I might say by way of a footnote, that there are some lessons which grow out of the *Berellez* case. During the 8-day period the Justice Department was deciding what to do about the judge's unfavorable rulings, they sought repeatedly to closet themselves with Judge Robinson to explain, ex parte, the basis for the classification. Under the proposed administration bill, that would have been their rights. Judge Robinson at that time stated:

> Gentlemen, I don't want to know the basis of the classification. You have told me that the Attorney General of the United States regards this as classified information. I'm satisfied. I'm satisfied that it is. The question here is whether or not it is relevant, and I have ruled that it is. I don't want to know the parade of horribles.

The judge correctly refused to allow his decision on whether this information was important to the defense, to be colored by the merits of the national security claim. That is an issue that the executive department of the Government must make; whether or not, in an in-

dividual case, it is in the public's interest to prosecute the defendant or to maintain the secret. That is not the judge's prerogative. A Federal district judge is not equipped to make that decision, and to the extent that the administration bill requires him to make that decision, I think that is bad law.

Mr. MURPHY. Mr. McClory.

Mr. MCCLORY. Well, I would conclude from the statement you have just made that anybody who has ever worked for the CIA or the FBI could successfully thwart his prosecution for virtually any offense which he or she committed under, as Mr. Tigar pointed out, a broad interpretation of the elements of relevance. It can be relevant to the defendant's veracity if it is being challenged. Indeed, it can be relevant to almost any aspect of a defendant's presence in court under one analysis. That statement, coupled with your conclusion that we should not be overawed by the broad subject of graymail, bothers me because I am sure that there is a strong public demand on not summarily vindicating any intelligence agent merely because he or she comes before the court and says that well, you can't prosecute me because if you do I'm going to have to spill classified information and this is going to hurt the national security.

I just feel we have a tremendous responsibility. I feel that there may be differences of opinion as to whether the judge should be able to weigh the question of classification or whether the Attorney General's decision is final and not subject to being considered by the court, but I am disturbed by your suggestion that the only two things we need to pay any attention to are the notice and pretrial determination and the interlocutory appellate review.

Mr. SCHEININGER. Congressman McClory, I think that I did not mean to suggest to the committee that an individual who was indicted in a case involving national security is free at his discretion to introduce whatever security secrets he may have in his head. That is not the rule of law. That is not the standard now, and it wouldn't be the standard after these bills, in whatever form, are promulgated.

The standard is that a particular piece of evidence, in order to be mentioned by defense counsel in an opening argument, in order to be brought out in questioning a witness on the stand, must be relevant and material to either an element of the offense, a legally cognizable, if you will, defense, or an issue of impeachment. If it isn't one of those, it doesn't come in, and if a defense counsel or witnesss, having been cautioned not to bring it out, does bring it out, that counsel or witness is subject to the judge's powers of contempt.

So our position is not that a defendant can say anything he wants, and I might add by way of a footnote that in the ITT case, one of the issues——

Mr. MCCLORY. Do you think we already have the mechanism for handling these problems without legislation?

Mr. SCHEININGER. Absolutely, no question about it, Congressman. I think that—in other words, the rationale that the——

Mr. MCCLORY. I don't think the courts feel that way. Certainly the prosecution, the Attorney General, doesn't feel that way. Members on both sides of the aisle in both Chambers of the Congress feel a tremendous uncertainty in the administration of justice because of the presence of this subject that we describe as graymail.

Mr. SCHEININGER. Well, I think that the concern on the part of the Department of Justice for uniformity, for some vehicle by which to test what will come out and what won't come out is a legitimate concern. That concern has nothing to do with the standards by which a defendant can defend himself in a criminal proceeding.

Mr. MCCLORY. Well, you have to translate the need for uniformity into a legislative enactment. We can't tell the various circuits or the various district courts how they are going to handle trial cases except by spelling it out in legislation.

Mr. GUIDOBONI. If I might respond to that, sir, I think we also agree that one thing the bill does accomplish and where you do need legislation is to make certain of these procedures mandatory, so that all of your different districts and circuits are playing by the same rules. We don't oppose that goal. To the extent the bills accomplish that, we agree with them. We think that it is important that if there are 11 judges on the U.S. District Court here, that in an area as critical as national security, all the judges follow the same rules. We are in favor of that, sir. We are also in favor of procedures which will allow the Department of Justice to know what is going to happen before the trial begins. It will enable the Department of Justice to predict, and may solve the problem, although I didn't hear about much of a problem, between the Defense Department and the Department of Justice. They can make their assessment early.

We are also in favor of allowing the Justice Department to go up to the court of appeals and get a determination, which is something that they complained about in Berellez. Indeed, in my view, they may have had somewhat of a legitimate complaint there because they were operating under a mandamus standard which is tougher. Under the proposed legislation they are not. They just go up on an appeal, and obtain review.

We favor all of those things, and we believe that the bill introduced by Congressman Murphy goes a long way toward accomplishing these goals.

We agree with Mr. Tigar that much of this could be done without an entire revision or a whole new section, but my personal view is that that is a matter of legislative choice. I don't think the bottom line, if you will, is any different. You could make your Federal rules, you could amend the Government appeals statute, or you could do it this way. I don't think it is a significant difference although I would prefer the other way. But that is just a matter of personal choice.

Mr. MCCLORY. Do you think there is an urgency?

Mr. GUIDOBONI. I think so, although I take Mr. Heymann's remarks this morning as indicating that he was not in a great big hurry.

I think it is like anything else. The Congress should approach it with deliberative speed. And I am not asking for a delay, simply that you continue to give it a lot of consideration.

Mr. MCCLORY. Should the law, if enacted, be applicable to pending cases?

Mr. SCHEININGER. I think we respectfully disagree with Mr. Tigar on that point. I think the Supreme Court decisions on retroactivity are that if the new law affects substantive rights of the defendant as distinguished from procedural rights—for instance, the order in which

the evidence is heard is a procedural rule as distinguished from the standard by which evidences comes into court, which is a substantive issue—if it is simply a procedural rule, it can be retroactive. If it affects substantive rights it must be prospective. We believe that the administration bill affects substantive rights and thus that bill would have to be prospective only.

Mr. McCLORY. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Any counsel questions?

Chief counsel.

Mr. O'NEIL. In the light of your comments about the ITT case, could you comment on the particularity of the provisions in H.R. 4745 that deal with protective orders that may be ordered by the court? Mr. Tigar has already commented on one particular provision, I think the fourth.

Mr. SCHEININGER. Well, I think that I agree with Mr.—I believe Mr. Halperin said that a shopping list is unnecessary. This is an issue that is properly within the court's discretion. I think the point Mr. Tigar made is a very good one. In the ITT cases we, I guess I could say, subjected ourselves to a national security investigation, and I believe in the L. Patrick Gray case the attorneys did the same thing. It is entirely appropriate to feel that that is an intrusion into my personal affairs which I don't have to make simply to represent a defendant in a criminal case in the courts of this country, and I think that is the point Mr. Tigar made.

Aside from that, I think that the other provisions in the 4(a) housekeeping section of the administration bill may be appropriate.

Mr. McCLORY. Mr. Chairman, I am going to have to be excused, but I do want to say that I think this has been a most fruitful set of hearings this morning and this afternoon. We have heard from some of the legal experts of the country. The brilliance of counsel this afternoon, counsel at the witness table now, and Mr. Tigar and other witnesses has been tremendously impressive and extremely helpful to us in our legislative responsibilities.

Mr. MURPHY. Well, I thank my colleague from Illinois for giving up his time today. I appreciate it.

Ira, do you have any questions?

Mr. GOLDMAN. Yes. Thank you.

Do you think that the rape evidence rule is unconstitutional in that it doesn't provide any kind of reciprocity?

Mr. SCHLESINGER. I believe it is constitutionally suspect, yes. I believe the language of *Wardius* v. *Oregon* unconditionally requires reciprocity, and that reciprocity has to be equivalent to the discovery that has been extracted from a defendant. So what a defendant has to give, in turn the Government must give, and I think that Congressman Murphy's bill adequately provides for that.

Mr. GOLDMAN .Well, I imagine, then from what you have said, that as far as Mr. Murphy's bill is concerned, that providing for the Government to give to the defendant information it will use to rebut the classified information that the defendant has proffered is adequate, and that from a constitutional standpoint, the bill of particulars in addition is not required.

Mr. SCHLESINGER. No, I think that you may be failing to distinguish that there are two separate kinds of reciprocity in the bill, both of which are required. The bill of particulars requirement is triggered under Mr. Murphy's bill when a defendant has to identify and give notice: For instance, under the bill, when I say to the judge and the Government that I intend to introduce a piece of what I perceive to be national security information, the Government then goes into court and asks the judge to bar me from doing that. I then have to explain why I believe the information is relevant to my case. Before I do that, the bill of particulars provision is triggered, and the Government must explain to me what their specific allegations are concerning that aspect of the indictment that I have identified as being relevant to national security. That is one kind of reciprocity.

The other kind of reciprocity—where the Government explains what evidence it will use to rebut the national security information—is for a different purpose. This reciprocity is triggered only after the judge agrees with me that I may properly introduce classified information. This reciprocity is to compensate for the fact that the defendant has had to identify not only the specific classified information upon which he will rely, but beyond that, explain the whole theory of his defense as to how it relates to that information. So, in Mr. Murphy's bill there are two kinds of reciprocity, both of which are required.

Mr. GOLDMAN. Do you interpret the bill of particulars provision as not applying to the entire indictment but only as to the parts that deal with classified information?

Mr. SCHEININGER. That is the way I read the bill; yes, sir.

Mr. GOLDMAN. The chairman's bill would provide that after an interlocutory appeal, if the defendant loses on that appeal and then is convicted, that he would have another opportunity to appeal on the same issue, if he appealed his conviction.

Certainly, it is helpful for a defense attorney to have two cracks at a given battle, but do you see any constitutional problems with that as far as finality?

Mr. GUIDOBONI. If I could respond to that, I think a large part of the Justice Department bill is based on a provision in the D.C. Code, section 23–104, which allows for certain interlocutory appeals by the prosecution. It is more recent than some of the amendments to the Federal code.

The rationale which supports permitting the defendant to raise the issue a second time following conviction is that an in-trial appeal, supposedly is done in a hurried fashion, you have the right to not—the appellate court can dispense with written briefs, a written opinion, et cetera. The idea is that the court make a quick call on the issue, up or down, and the trial proceeds. The reason the defendant is allowed to raise the issue again is that after full briefing and argument and more deliberate consideration, which is the way appellate courts generally do business, you know, the court may see it in a different light. But at least the trial will go to a conclusion.

For this reason I think it makes good sense to allow the defendant that second bite of the apple. There is another reason I favor this provision.

I can tell you from personal experience that if I am involved in a trial, and all of a sudden the Government says we are going to the

court of appeals, and we have got to argue in 2 or 3 days and the trial is going on, it is hard to shift gears. It is hard for them and it is hard for me, and I may not have all the authorities available. Appellate advocacy is a different kind of art.

So I think that in this sense also it is a good provision to allow two bites at the apple for the defendant.

I might add that I am familiar with the D.C. Code provision, and the in-trial part of it has only been used, so far as I know, once or twice. The way it was handled was a written summary opinion came out of the court, basically holding yes or no, and then later the court issued another more detailed opinion setting forth its rationale.

Mr. GOLDMAN. I have one more question.

Do you know if there have been any challenges to the rape evidenced rule?

Mr. SCHEININGER. I'm sorry, I don't.

Mr. GUIDOBONI. I might say this. You don't try all that many rape cases in Federal courts and it is a relatively new provision.

Mr. GOLDMAN. Do you know if there are any plans to take that rule and put it into the local code in the District of Columbia?

Mr. GUIDOBONI. I served on the D.C. Law Revision Commission which Congressman Mazzoli shepherded for a while. They have a different approach there. The Commission proposal simply requires an offer of proof and a ruling before introduction of the evidence. It does not require notice in advance of trial. Although I voted against the provision because I believe it allows more disclosure than the present case law of the District, as I recall it comes up in trial and the judge simply hears the evidence outside the presence of the public and makes the decision. Now, at that point obviously you don't have the problem with tipping of your hand. You are right there and you are about to put the evidence on and the judge says hold it, let's go clear the courtroom and we will discuss it.

So it is different from the Federal provision. You don't have the constitutional problem that we see here, which is advance notice by the defendant without reciprocity by the Government.

Mr. GOLDMAN. Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Raimo.

Mr. RAIMO. Referring to your comments on the ITT case, do you think that if either of these bills had been in effect at the time of that prosecution the case would have gone to trial?

Mr. SCHEININGER. Well, that is complicated. I think that if the interlocutory appellate review provision had been in effect, the Department of Justice would have been able to obtain review by the Court of Appeals which declined review because the mandamus procedure has a stricter standard. Then the Justice Department then would have had the feedback it sought from the Court of Appeals. But I don't think that the case would have proceeded to trial unless the Justice Department, in its discretion, decided then to allow the national security secret to come out, because that is what the trial court had ruled, and I do not believe the Court of Appeals, even had in considered the merits of the appeal, would have reversed that ruling.

Mr. RAIMO. Thank you.

Thank you, Mr. Chairman.

Mr. MURPHY. Gentlemen, we appreciate your attendance here today, and we think you have shed some light on what obviously is a problem. Some people don't think we need any legislation, others think we do.

I think as the overseas bribery statute and more and more of this intelligence becomes more important than it has been in the past, we will be into this problem, especially with the creation of both the Senate and the House Select Committees, and we thank you for your expertise.

Thank you.

The committee will stand adjourned.

[Whereupon, at 3:30 o'clock p.m., the subcommittee adjourned.]

H.R. 4736 AND H.R. 4745—GRAYMAIL LEGISLATION

THURSDAY, SEPTEMBER 20, 1979

HOUSE OF REPRESENTATIVES,
PERMANENT SELECT COMMITTEE ON INTELLIGENCE,
SUBCOMMITTEE ON LEGISLATION,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:11 a.m. in room H-405, the Capitol, Hon. Morgan F. Murphy (chairman of the subcommittee) presiding.

Present: Representatives Murphy (presiding), Mazzoli, Boland (chairman of the committee), and McClory.

Also present: Michael J. O'Neil, chief counsel; Patrick G. Long, associate counsel; Bernard Raimo and Ira H. Goldman, counsel, and Herbert Romerstein, professional staff member.

Mr. MURPHY. Good morning, ladies and gentlemen.

The Subcommittee on Legislation of the Permanent Select Committee on Intelligence will come to order.

Today marks the second and final phase of this subcommittee's hearings on proposed graymail legislation.

Graymail is the term used to describe the difficult choice facing the Government when it contemplates seeking an indictment or continuing the prosecution of a case in which national security information may be revealed.

The two bills before the subcommittee, H.R. 4736 and H.R. 4745, would require a criminal defendant to notify the court and the Government before trial of any intent to disclose classified information during trial.

The Government could then obtain, pursuant to an in camera proceeding, a pretrial ruling on the relevance and admissibility of the classified information.

Testifying this morning will be several members of the defense bar.

The first witness will be Philip Lacovara, former Assistant Solicitor General and later Assistant Watergate Prosecutor. Mr. Lacovara is now a member of the firm of Hughes, Hubbard and Reed. He is making his second appearance before the subcommittee on this topic. It can certainly be said that his previous testimony and advice have helped shape, in no small part, the legislation we consider here today.

Mr. BOLAND. We welcome Mr. Lacovara. He certainly has had experience in these areas. His testimony, along with that of the other witnesses will be important in the final resolution of this matter by this committee.

We welcome you.

STATEMENT OF PHILIP LACOVARA, ESQ., HUGHES, HUBBARD & REED, FORMER ASSISTANT SOLICITOR GENERAL AND FORMER ASSISTANT WATERGATE PROSECUTOR

Mr. LACOVARA. Thank you, Mr. Chairman. I appreciate your kind remarks.

Before beginning to summarize the lengthy statement that I have filed with the subcommittee, perhaps I should say something about the perspective that I have tried to bring to bear on these problems.

I have served in the Government as a prosecutor, and I have had some familiarity from that vantage point with the graymail problem. Since leaving Government service, I have wound up on the defense side of several cases, and I am also the chairman of the board of trustees of the Public Defender Service of the District of Columbia, and one of our former chief staff members was a witness before this subcommittee at its prior session on this subject, Tom Guidoboni.

What I have tried to do in my submissions to the subcommittee, both last time and in this statement, is to approach this not from the vantage point of a prosecutor, not from the vantage point of a defense lawyer trying to load the process to tilt in either direction, but to come up with some suggestions that I think would make sense in terms of reconciling legitimate interests on both sides, the interests of the people of the United States in pursuing what seem to be serious allegations of Federal criminal violations, with the competing interest of the defense in being able to conduct an adequate and fair defense against these charges.

The two bills that are before the subcommittee this morning seem to me to be quite worthwhile efforts to reconcile those two interests. As I explain in some detail in my statements, I believe each bill has some features that I would recommend that the subcommittee change. I think that, in terms of structure, as a basic drafting underpinning for further changes, I would rather see the subcommittee work with the administration bill, H.R. 4745, making in it, however, many of the modifications that would bring it more in line with the subcommittee's draft, H.R. 4736. There are some features of both bills that I think should be changed, either by deletion or by addition, and my statement goes into some considerable detail about both broad issues and what I would consider technical drafting clarifications.

Just by way of summary, Mr. Chairman, I think it is a worthwhile——

Mr. MURPHY. I would like to make a motion at this time, if you are going to summarize it, Mr. Lacovara, that we receive the full statement in the record.

Are there any objections by any members?

It is so ordered that your full statement be incorporated in the record.

[The prepared statement of Mr. Lacovara follows:]

STATEMENT OF PHILIP A. LACOVARA, PARTNER, HUGHES, HUBBARD & REED, WASHINGTON, D.C., FORMERLY COUNSEL TO THE WATERGATE SPECIAL PROSECUTOR AND DEPUTY SOLICITOR GENERAL OF THE UNITED STATES

Mr. Chairman, it is a privilege to accept the invitation to testify on the two bills that the Subcommittee has under consideration. Each of these bills represents a substantial and worthwhile effort to resolve the "disclose or dismiss"

dilemma that has frustrated otherwise warranted criminal investigations and has aborted important criminal prosecutions.

These bills are the response to hearings held last year in the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence and earlier this year by this Subcommittee. One major focus on those inquiries was the so-called "gray mail" problem. The term describes a threat by a suspect in a criminal investigation or by a defendant in a criminal prosecution to force the disclosure of national security information if the prosecution proceeds. In a number of cases, the government's concession to those threats has effectively conferred immunity from the federal criminal laws.

Even apart, however, from overt threats asserted as a matter of bargaining strategy, the historic reluctance of the intelligence community to risk compromising its information and the resulting tensions between the intelligence agencies and the Justice Department have led federal authorities to abandon seemingly justified criminal investigations in a mood of premature despair.

The burden of the testimony that other witnesses and I gave before the two subcommittees is that this problem is a real one; that, while it affects a relatively small number of cases, they tend to be cases of unusual public importance; that greater flexibility on the part of the intelligence agencies, greater determination among federal prosecutors, and greater imagination by trial judges could reduce the scope of the problem; and that legislative prescription of the new procedures and alternatives could usefully accommodate the public interest in vigorous criminal investigation and enforcement with the constitutional right to a fair trial.

Rather than repeat my earlier testimony, I am instead annexing (as Appendix A and Appendix B) copies of my earlier prepared statements. They explain why I believe a problem exists, why it merits legislative attention, and what I believe are some of the appropriate responses. Those statements reflect my own experiences and observations and contain my legal analysis of the issues.

In my testimony this morning, I shall focus on the two bills that have emerged from the earlier deliberations. In particular, I shall address what I perceive to be the principal issues of policy and procedure raised by the bills and by the limited differences between them. In general, while I regard both bills as worthwhile, I prefer the general organization and format of the Department of Justice bill, H.R. 4745. I disagree with some of its features, however, including its failure to include some provisions that are included in the subcommittee bill, H.R. 4736.

GENERAL OVERVIEW: THE PURPOSE AND THE PROCESS

The theme of both bills is that the public interest in legitimate law enforcement and the defendant's interest in a fair trial may be reconciled by the early, careful, and measured intervention of a trial judge. The basic approach taken by both bills is to ensure that the trial judge, upon request, screens classified information that the defendant wishes to obtain in discovery or proposes to use in his defense. The purposes of the screening are (1) to ensure that the information is genuinely relevant to the issues in the case and (2) to decide whether some alternative form or statement of the information will adequately satisfy the defendant's interests without gratuitously compromising properly classified data.

The procedures outlined in the legislation are hardly revolutionary, since they are modelled on existing provisions of the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. What makes the legislation important is that there has been uncertainty and inconsistency in the application of those general provisions in "national security" cases. The legislation is worthwhile, therefore, in expressing a clear congressional judgment that the federal courts must give these issues careful and methodical treatment in accordance with a clearly defined process.

PREFERABLE FORMAT: AMENDMENTS TO FEDERAL RULES

In this context, I wish to note my agreement with the observation of some earlier witnesses that, wherever possible, legislation of this sort should take the form of amendments to the Federal Rules of Criminal Procedure and the Federal Rules of Evidence. There are two persuasive reasons for using that format.

First, I regard it as desirable to avoid the construction of what would otherwise seem to be a special, separate code of procedures for secrecy-related cases. I do not believe that the pending bills may properly be criticized as excesses, but Congress should be sensitive to the need to avoid even the appearance of downgrading the constitutional rights of persons suspected of violations that may be peculiarly notorious or controversial. It is far better, in my judgment, to integrate these proposed procedures into the general body of federal procedural and evidentiary jurisprudence.

Second, insertion of these new procedures into the Criminal Rules and the Rules of Evidence would make them subject to the continuing oversight of the Supreme Court and the Judicial Conference of the United States. See 18 U.S.C. 3771, 3772; 28 U.S.C. 2076. That oversight would permit the judiciary, after due deliberation, to fashion modifications that may be necessary over time to fine-tune the legislation. Of course, any proposed amendments to the rules of procedure and evidence would lie before Congress before taking effect. In addition, Congress would retain its right to initiate alterations independently at any time it is so inclined.

LIMITED SCOPE OF RESTRICTION ON DISCLOSURE

It is worth emphasizing that this legislation is not intended to serve as an American equivalent of the British Official Secrets Act. It does not purport to confer any general power on the courts to muzzle private citizens or the press in order to prohibit them from disclosing classified information. The focus of the bills is simply on the prospective disclosure of classified information by the defendant "in connection with" a pending federal criminal case. See section 102(a)(1) of H.R. 4736; section (5)(a) of H.R. 4745.

As a result, the bills would not add any further restrictions, beyond those already in force, that would prohibit a suspect in an investigation from disclosing classified information prior to indictment. Obviously, also, the bills add no new provisions to guard against either espionage or leaks.

Moreover, although both bills prohibit disclosures of classified information "in any manner" in connection with a pending prosecution, I do not understand the bills to control what a defendant may say or write independetly of the criminal proceeding. That is, if a defendant possesses classified information that he acquired prior to the discovery process in the case, any restriction on his right to discuss it or write about it would come only from other federal statutes, regulations, and executive orders, to the extent applicable. As I understand it, this legislation is designed solely to regulate what a defendant and his counsel do about disclosures in court papers and in the courtroom and to superintend the use they make of information that is provided to them as part of the discovery process. I regard it as quite appropriate for Congress and the courts to define the boundaries of the proper use of classified information "in connection with" federal trials.

Both bills, however, contain some ambiguity about the scope of the restriction. The ban on disclosure "in any manner" might be construed as restricting the defendant's ability to discuss classified information with his counsel or as restricting counsel's ability to discuss it with the prosecutor or the court. Restrictions of that sort would not be warranted. The bills should specify, however, that the restrictions apply not only to the defendant personally but also to his counsel. Thus, for example, section 102(a)(1) of the Committee bill should be modified to provide that "neither the defendent nor his counsel" may disclose or cause the disclosure of the classified information "except to the attorney for the United States or to the court in connection with proceedings under section 102(b)–(f)."

ROLE OF THE ATTORNEY GENERAL: LIMITED DELEGATION

The subcommittee bill, H.R. 4736, specifies that a number of certifications and requests may be made only by "the Attorney General". Dealing unambiguously with a question similar to the one that led to the frustration of hundreds of criminal cases under the Supreme Court's wiretapping-authorization decisions a few years ago,[1] section 112 of the subcommittee bill provides that the Attorney

[1] *United States* v. *Giordano*, 416 U.S. 505 (1974); *United States* v. *Chavez*, 416 U.S. 562 (1974).

General's functions may be delegated as far down as an Assistant Attorney General, but no further. The Justice Department bill, by contrast, would allow any federal prosecutor to make the judgments about invoking these special procedures, reserving to the presidential appointees within the Justice Department only the function of certifying that an interlocutory appeal is not taken for purposes of delay. I support the subcommittee bill on this issue.

The procedures and certifications that the subcommittee bill would place under the immediate supervision of the Attorney General or his delegate are sufficiently important and peremptory to justify the requirement of personal involvement at least by the Assistant Attorney General. Although it is a bit more cumbersome to obtain the approval of an Assistant Attorney General, the cases to which these procedures may apply are inherently sensitive and are likely, in any event, to be conducted under the active supervision of the Criminal Division in Washington.

PROPRIETY AND SCOPE OF "IN CAMERA" AND "EX PARTE" PROCEEDINGS

One of the most delicate features of both bills is their extensive provision for *in camera*—secret—proceedings.

Largely in response to the Supreme Court's decision a few months ago in *Gannett Company* v. *DePasquale*, — U.S. —, 61 L.Ed. 2d 608 (1979), in which the Court held that the public and the press could be barred from a pretrial suppression hearing in order to avoid prejudicial publicity, there has been considerable furor about the dangers of "secret" criminal proceedings. The Sixth Amendment expressly guarantees to a person charged with a crime the "right to a speedy *and public trial*." The Court held in *Gannett* that, at least where the accused joins in a request for the closing of a pretrial proceeding, the public interest in open judicial proceedings does not prohibit a court from granting that request.

Two things are notable about the *Gannett* decision. First, the Court emphasized that it was dealing only with pretrial proceedings related to the admissibility of evidence and not with the actual trial of guilt or innocence. Secondly, the Court emphasized the importance of the defendant's own consent to the *in camera* proceeding.

The question raised by *Gannett* is whether Congress may constitutionally establish a requirement that, when requested by the government, a court must conduct *in camera* pretrial or ancillary procedures concerning the scope of discovery or the admissibility of evidence. Although the matter is not wholly free of doubt, it is my judgment that the Constitution permits Congress to require that proceedings of that type take place *in camera* when there is an important governmental interest in doing so. The preservation of classified information against needless disclosure surely constitutes a legitimate governmental interest in the conduct of *in camera* proceedings. *See United States* v. *Nixon*, 418 U.S. 683, 713–16 & n.21 (1974); *United States* v. *Reynolds*, 345 U.S. 1 (1953). Both bills provide reasonable protection against the abuse of this device.

While unusual, *in camera* pretrial proceedings are not exceptional, even without the concurrence of the defendant. As I have described in my earlier testimony (Appendix B, pp. 12–15), the Supreme Court and lower federal courts have approved the use of *in camera* proceedings in handling classified information as well as in other settings. The Congress has expressly provided for such proceedings in civil cases under the Freedom of Information Act, including of course cases concerning classified information. 5 U.S.C. § 552(a)(4)(B) and (b)(1). In the *Nixon Tapes Case, supra*, the Supreme Court expressly authorized Judge Sirica to review the White House tapes *in camera* to remove extraneous matter, including state secrets. *United States* v. *Nixon, supra*, 418 U.S. at 713–16 & n.21. Last year, Congress added new Rule 412 to the Federal Rules of Evidence, requiring an *in camera* hearing whenever a defendant in a rape case seeks to introduce evidence of the victim's past sexual behavior.

A related question is whether the ordering of an *in camera* hearing should be automatic, as the subcommittee bill seems to provide whenever the Attorney General so requests. *See* sections 102(a)(2)(B), 192(b)(2)(B), 103(a), 109(b). By contrast, the Justice Department bill requires that it make a preliminary showing that information involved is properly classified. *See* section 6(b). It is interesting that there has been criticism of the Justice Department approach, even though it gives more discretion to the trial judge. There is some fear that the *ex parte*

submission concerning the sensitivity of the information may prejudice the judge's ruling on its relevance and on its producibility in its pristine form.

This is a hard problem, but on balance I would endorse the Justice Department approach. The risk of tainting the trial judge seems small, especially when one realizes that the judge is equally likely to be exposed to the government's arguments about the delicacy of the information at the actual hearing. There is no reason to believe that the defendant will be unable to make whatever counter arguments are weighty at that time. I am more concerned about allowing the government the power to trigger *in camera* proceedings automatically, and I thus endorse the requirement that there must be some preliminary showing to justify that course.

A related issue is the extent to which each bill permits *ex parte* proceedings, that is, an *in camera* proceeding in which only one party—the government—is fully participating. Most of the *in camera* proceedings would involve the defendant and his counsel, in the sense that they would be physically present and would have access to the information at issue in litigating about its disclosure. There are exceptions, however.

For example, under section 102(e) of the subcommittee bill, the United States need only describe by generic category the information that is of concern to it in a screening hearing if the information has not previously been made available to the defendant, such as during government employment. That means that, to a considerable extent, the defendant must endeavor to show the relevance of information without actually seeing the information itself. I know that some witnesses have criticized this approach, pointing out that the Supreme Court in cases like *Jencks* v. *United States*, 353 U.S. 657, 659 (1957), and *Alderman* v. *United States*, 394 U.S. 165, 183–86 (1969), has held that the defendant is entitled to participate in the determination of relevance.

These cases, however, do not require direct examination of the sensitive information by the defendant and his counsel. There is abundant legislative and judicial support upholding the ability of trial judges to make analogous determinations *ex parte* and the propriety of establishing that procedure in selected settings. Congress expressly overruled the *Jencks* decision in the so-called Jencks Act, 18 U.S.C. 3500. Under section 3500(c), the trial court is now required to examine a prior written statement by the government witness *in camera*—and *ex parte*—to see whether the government is correct in arguing that some or all of the prior statement is irrelevant to the witnesses' testimony. If so, the statement is to be withheld or excised. The courts have regularly implemented that legislatively established procedure over the last 20 years, exercising generally satisfactory judgment.

The *Alderman* approach, too, is distinguishable. The Supreme Court in *Alderman* was assuming that the classified material consisted of information obtained as the result of an illegal search in violation of the defendant's constitutional rights. Balancing the respective interests, the Court held that the defendant should be entitled to access to the illegally acquired material in order to argue its relevance as a taint upon his prosecution. Shortly thereafter, however, the Court acknowledged that the trial judge may properly act *ex parte* in passing upon related questions, like the defendant's standing to object and the legality of the seizure, when classified information is involved. *See Giordano* v. *United States*, 394 U.S. 310, 314 (1969) (Stewart, J., concurring); *Taglianetti* v. *United States*, 394 U.S. 316, 317–18 (1969) (per curiam).

There are other instances in which the judge is called upon to make similar determinations without providing the defendant direct access to the material in issue. For example, under Title III of the 1968 wiretapping legislation, 18 U.S.C. section 2518(10)(a), a trial judge passing upon a suppression motion has the discretion whether to make some or all of the intercepted communication available either to the defendant or to his counsel, but he is not required to do so.

As illustrated by the *Nixon Tapes Case*, *supra*, a subpoena under Rule 17(c) of the Federal Rules of Criminal Procedure, seeking the production of potential evidence prior to trial, may depend upon a generic showing of relevance and admissibility, even without access to the information. The judge may rule upon those questions without providing access to the documents themselves. *See* 418 U.S. at 715 n.21.

In addition, as I indicated above, the Freedom of Information Act "contemplates that the courts will resolve fundamental issues in contested cases on the basis of an *in camera* [and *ex parte*] examination of the relevant documents."

Phillippi v. *Central Intelligence Agency*, 549 F.2d 1009, 1112–13 (D.C. Cir. 1976). The courts have upheld the propriety of that procedure when classified information is at issue. *E.g.*, *Environmental Protection Agency* v. *Mink*, 410 U.S. 73 (1973); *Fensterwald* v. *Central Intelligence Agency*, 443 F. Supp. 667 (D.D.C. 1977).

Under this analysis, as section 102(e) seems permissible. For similar reasons, so does section 109(b). Section 109(b) authorizes an *ex parte* motion for a protective order that would substitute summaries or admissions for classified data or that would delete specified, irrelevant items. This procedure would place some burden on the trial judge because he would have to be familiar with the defendant's theory of the case. That familiarity, however, should emerge from the pretrial proceedings that are contemplated under each bill and from the defendant's statement of need when he pursues documentary discovery from the government.

If this Committee decides to authorize limited *ex parte* submissions for these purposes, the approach taken by the Justice Department bill in sections 4(b), 6(b), and 6(c)(1) seems to me to be preferable. The Justice Department approach is more comprehensive and it also enumerates in detail several alternative actions that the trial judge should consider taking.

VALIDITY OF SUBSTITUTES

Some witnesses have questioned the constitutionality and fairness of permitting the court to decide that some other form of the information sought by the defendant will adequately protect the defendant's interest. Their argument, which is quite plausible and deserves serious consideration, is that the defendant and his lawyer are in the best position to make the judgment about the effective use of relevant evidence. The judge, they insist, is in no position to usurp that function. I am persuaded, however, that a provision for careful judicial inquiry into the development of alternatives that will satisfy a defendant's legitimate interests could be fairly administered. As I shall explain in a moment, however, the balance should be tilted a bit further in the defendant's direction.

Under section 4(b)(1) of the Department of Justice bill, the court is to make original information available in discovery if that disclosure "is necessary to enable the defendant to prepare for trial." Similarly, under section 6(c)(3), the original information may be used at trial if the "use of the classified information itself is necessary to afford the defendant a fair trial." The subcommittee bill contains less specificity about the alternatives or the grounds for their use, and makes the availability of alternatives turn on a finding that "the defendant's right to a fair trial will not be prejudiced thereby." Section 103(a). *Compare* section 106(b).

The assumption underlying the provisions in each bill is that the defendant's legitimate interest in acquiring and using classified information may often be fully satisfied in some other way. I regard that assumption as generally sound. Where, for example, it may be necessary or relevant for the defendant to offer evidence to show that he or someone else had access to nuclear missile data, the government's admission of that fact should be a sufficient substitute for the physical production of the missile specifications themselves. It will be up to the courts, of course, aided by arguments from the defendant's counsel, to craft the alternatives in such a way that they provide the defense with the full and equivalent measure of evidentiary support to which the defense is legitimately entitled.

The constitutionality of this process seems to me beyond question. The Supreme Court has already suggested in the informer-privilege cases that some "sanctions" short of outright dismissal may be appropriate where the government elects to withhold the identity of an informant. *See* Appendix B, p. 11. Under the Jencks Act, 18 U.S.C. 3500(d), Congress has provided that the government's refusal to produce for the defendant a prior statement of a government witness will ordinarily result only in the striking of that witness's testimony.

Rule 16(d)(2) of the Federal Rules of Criminal Procedure, specifies, in a similar vein, that if the government refuses to permit particular discovery, the court may prohibit it from introducing the specific item withheld or may enter any other corrective order as the court "deems just under the circumstances."

The basic test is that the sanction or alternative should put the defendant in substantially the same position that he would be in if he had actually obtained the information sought. In an analogous context, the Supreme Court has upheld the constitutionality of the "use immunity" statute, 18 U.S.C. 6001–05, on the

ground that its prohibition against the use of compelled testimony in a criminal case offers a reluctant witness substantially the same protection as that guaranteed by the Fifth Amendment privilege against self incrimination, even though there may be some other collateral disadvantages. *See Kastigar* v. *United States*, 406 U.S. 441 (1972). That analysis seems fully applicable to provisions like sections 4 (a) and (b) and 6(c) of the Justice Department bill and sections 103 and 105 of the subcommittee bill.

I do suggest, however, that the standard contained in both bills may be too lax or vague and may not provide sufficient protection for the defense. As drafted, the bills require the court to withhold classified information from the defendant, upon the government's request, unless it would be "necessary" for the defendant to have it, as provided in the Justice Department bill sections 4(b)(1) and 6(c)(3)), or unless its non-disclosure would "prejudice" the defendant's right to a fair trial, (as in section 103(a) of the subcommittee bill). I suggest, instead, that the use of alternatives be made permissible "unless the court finds that no alternative will provide the defendant with substantially the same ability to prepare for trial or to make his defense as would the disclosure of the specific classified information."

RECIPROCITY OF PRETRIAL DISCLOSURE

Section 107 of the subcommittee bill contains a provision for reciprocal disclosure by the government whenever the defendant has had to specify the evidence he proposes to use at trial and the court has substantially upheld his right to use either that evidence or an adequate substitute for it. The Justice Department bill contains no similar guarantee. Indeed, Assistant Attorney General Heymann actively opposes that provision.

In my view, the subcommittee's guarantee of reciprocity is fully warranted. The Supreme Court has emphasized that reciprocal disclosure is a necessary ingredient in any scheme that requires pretrial disclosure of defense evidence or defense strategy. *Compare Wardius* v. *Oregon*, 412 U.S. 470 (1973), *with Williams* v. *Florida*, 399 U.S. 78 (1979). Each of these two bills requires the defendant to provide the government with substantial information about his trial strategy. If the court upholds the legal soundness of that strategy, it is only fair to insist that the government disclose prior to trial its proposed rebuttal evidence. Since the government will have advance notice of some of the evidence the defense plans to use, I am satisfied that even-handedness requires equivalent disclosure by the United States.[2]

Moreover, I see no particular prejudice to the government's interest. The reciprocity provision simply requires advance disclosure of information that the government plans to produce at trial. To the extent that the information consists of some classified elements, the government may resort to the procedures established by these bills to safeguard against improvident disclosure of specific data.

JENCKS ACT REVISION

Witnesses have sharply divided over the desirability of section 10 of the Justice Department bill, the proposal to amend the Jencks Act to insert a new section 3500(c). The new provision would permit the court to excise from the prior written statement of government witnesses not only irrelevant classified material—which can be deleted under the present statute—but also to excise relevant classified material that is "consistent with the witness' testimony".

The Justice Department offers a plausible explanation for this change. Critics of it question its fairness and its feasibility. They suggest that even material that is not flatly contradictory in an earlier statement may be useful in impeaching a witness. For this truism they cite the *Jencks* decision, 356 U.S. at 667–68, where the Supreme Court noted that even the arrangement of facts in a different order or a contrast in emphasis may be useful in testing credibility.

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[2] Analogous rules are, admittedly, not consistent on this point. Rule 12.1 of the Federal Rules of Criminal Procedure does require reciprocal disclosure by the Government in response to the defendant's duty to give advance notice of the witnesses he proposes to call in suport of an alibi defense. Rule 412 of the Federal Rules of Evidence, added by Congress in 1978, however, requires the defendant in a rapae case to demonstrate prior to trial the relevance and importance of proposed evidence about the victim's prior sexual behavior. The Rule makes no provision for the Government to give pretrial notice of its rebuttal evidence.

Rule 12.2 of the Federal Rules of Criminal Procedure, requiring advance notice of an insanity defense, contains no provision for reciprocty, but that omission is meaningless. The Rule does not compel the defendant to disclose anything about the defense, even the identity of his expert witnesses, and thus reciprocity is not an apt concept.

I have little doubt that, as a constitutional matter, Congress may adopt the amendment sought by the Department of Justice. Marginal utility in cross-examination is not constitutionally protected under either the Due Process Clause of the Fifth Amendment or the Compulsory Process Clause of the Sixth Amendment. Congress has adopted or approved a number of evidentiary rules, including the Jencks Act itself and Rules 403 and 412 of the Federal Rules of Evidence, that restrict a party's use of marginally relevant evidence.

The need for the amendment, however, may be overstated, since the interests that the Justice Department wishes to protect may secure adequate protection under the other provision of the two bills. Those provisions would allow the court to screen out detailed information that would not be necessary or helpful to the defense.

Perhaps a compromise is in order. There might be less ground to object to the Justice Department proposal if the adverb "fully" is inserted on page 13, line 2 of H.R. 4745, thus permitting the trial judge to excise a portion of the prior statement only when he finds, after hearing the witness testify and after examining the prior statement, that the prior statement is "fully consistent" with the witness' testimony.

CONGRESSIONAL OVERSIGHT OF PROSECUTORIAL DISCRETION

Title II of the subcommittee bill would require the Attorney General to promulgate guidelines specifying the factors to be used in deciding whether to prosecute federal violations where there is a possibility that classified information will be disclosed. That bill would also require that federal prosecutors prepare detailed memoranda expressing the reasons for a decision not to prosecute based on those grounds. Those memoranda would have to be reported to the oversight committees of both Houses.

I question the utility of the requirement in section 201 of H.R. 4736 that the Attorney General issue guidelines governing the exercise of prosecutorial discretion in these cases. In doing so, I know that I am out of step not only with the assumption made in the subcommittee draft but also with the recent recommendation of the House Government Operations Committee, which recommended that the existing Justice Department memorandum laying out the process for making these decisions should be replaced by more formal, permanent regulations.[3] Nevertheless, I suggest that an attempt to enumerate these factors is bound to be so vague as to be susceptible to any interpretation or application that circumstances may warrant. It is not that I find section 201 objectionable, just that I regard it as pointless.

The real issue, it seems to me, is one that is not confronted by either bill. The legislation should clearly fix the responsibility for deciding within the Executive Branch whether to prosecute cases implicating national security information. As I explained in my earlier testimony (Appendix B, pp. 18–20), the clash between the responsibilities of the Attorney General and those of the Director of Central Intelligence makes this area somewhat murky. There appears to be a *modus vivendi* today between Attorney General Civiletti and Admiral Turner, under which the Attorney General is guaranteed full access to intelligence files in making the decision that properly belongs to him. I submit, however, that it would be worthwhile for Congress to make the policy determination that the Attorney General is entitled to unrestricted access to national security information in connection with his functions and that, subject to presidential control, he is ultimately responsible for deciding whether the public interest in prosecuting a federal crime outweighs the public interest in protecting a state secret. That type of statutory provision seems to me more useful than section 201 of the subcommittee bill.

Section 202 requires the preparation of detailed memoranda explaining decisions not to prosecute and demands that the Justice Department routinely forward those memoranda to the congressional oversight committee. I support the Justice Department's objections to these requirements.

Let me say at the outset that I support the principle of congressional oversight. That is not at issue. Even with a statutory directive, it is virtually certain, as a practical matter, that Justice Department files will include a "prosecution memorandum" in sensitive cases of this sort. Hence, the record will be there for examination when necessary. It is also certain, though, that few cases are likely

[3] See House Committee on Government Operations, "Justice Department Handling of Cases Involving Classified Data and Claims of National Security," H. Rept. No. 96–280, 96th Congress, 1st session at 22 (1979).

to involve seriously questionable judgments that will deserve congressional attention.

Accordingly, it seems to me that due respect for the separation of powers and for the independence of the Executive's prosecution function counsels in favor of minimal intrusion into Justice Department deliberations and files. Here too, a compromise solution seems best designed to reconcile legitimate but conflicting interests. At most, legislation ought to require the Attorney General to report to the two oversight committees the name of the prospective defendant and the offense or offenses for which he was under investigation. If either committee believes that it is worthwhile to pursue a particular matter, the inquiry can be handled on a more discrete and sharply focused basis.

POTPOURRI

Several technical or structural questions may also merit comment. For instance, earlier witnesses have suggested that the procedure for obtaining a protective order under section 4(b) of the Justice Department bill should track more closely the requirements of Rule 16(b)(1) of the Federal Rules of Criminal Procedure, the provision that generally authorizes the trial judge to regulate discovery in criminal cases. I concur with the proposal to conform the procedures under the bill with those that are generally applicable, including the requirement of a written submission by the government that may be maintained under seal for possible appellate review.

Both section 102(f) of the subcommittee bill and section 8(d) of the Justice Department bill contain provisions that I find quite ambiguous. In providing the government with an opportunity to object to a line of questioning of a witness when that line has not previously been screened, each provision directs the court to "take such ['suitable'; H.R. 4745] action to determine whether the response is admissible as will safeguard against the ['compromise'; H.R. 4745] ['disclosure'; H.R. 4736] of any classified information." Stated that way, these provisions on their face suggest that the court is to gag the witness permanently if his testimony would reveal classified information. The provisions appear to make the prevention of disclosure the overriding duty of the trial judge. That is certainly not what is intended. Rather, the trial judge should be required to protect against disclosure *until* admissibility and alternatives are screened in accordance with the other sections of each bill.

Both bills provide that the government may take interlocutory appeals from disclosure orders that may threaten its ability to proceed with a case. An interlocutory appeal by the government has ample statutory precedent in other situations, and I support this approach. Certain ambiguities, however, should be clarified.

Both bills provide for the trial court to defer or adjourn the trial until the appeal is "decided" or "resolved." *See* section 108(b)(1), H.R. 4736; section 7(b), H.R. 4745. Lest there be any uncertainty that might magnify the delay and interfere with the interest of both the public and the accused in a speedy trial, legislation on this subject should specify that a petition for review by the Supreme Court will not lie at that interlocutory stage.

Moreover, both bills suggest that, in meeting the tight timetable for disposing of an appeal taken during trial, the appellate court may dispense with the issuance of a written opinion. Since there is no requirement at present that appellate courts file written opinions, and since they often dispense with them when circumstances seem to warrant, a legislative suggestion to that effect seems both gratuitous and patronizing.

Section 109(a) of the subcommittee bill directs that, upon motion of the United States, "the court shall issue an order to protect against the disclosure of any classified information" made available in discovery. That formulation seems unintentionally too sweeping. What I believe the subcommittee intended is to restrict the disclosure of classified information that is made available to the defendant in discovery *except* to the extent that disclosure is otherwise authorized in connection with the proceedings and in accordance with the statutory screening procedures. A change that make that intent clear would be useful.

Finally section 8 of the Justice Department bill would modify several provisions of the Federal Rules of Evidence concerning the admissibility of duplicates, summaries, or excerpts of writings. These changes are within the power of Congress and leave sufficient discretion to the trial judge to avoid unfairness to the defendant.

CONCLUSION

The bills pending before the Subcommittee invite it to confront boldly a number of complex and vexing problems. The enterprise is well worth the effort. With the adjustments that I have proposed, either of these two bills—or, I hope, a restructured synthesis of the two of them—would make a major contribution to the resolution of the "disclosure or dismiss" dilemma.

APPENDIX A

STATEMENT OF PHILIP A. LACOVARA, PARTNER, HUGHES, HUBBARD & REED, WASHINGTON, D.C.

"Protection and Use of National Security Information"

Mr. Chairman, I am pleased to be back before this Subcommittee to offer some thoughts about another group of problems that you are now considering When I testified before this Subcommittee in the last Congress on various proposals for a Foreign Intelligence Surveillance Act, which has now been enacted into law, the members of the Subcommittee were very gracious in listening to my comments. Against that backdrop, I am especially pleased to have been invited back.

THE TWO FACES OF THE PROBLEM: DISCLOSURE IN THE FIELD AND DISCLOSURE IN THE COURTROOM

In considering the protection that should be afforded to legitimate national security information, the Subcommittee must confront two distinct challenges. One is to decide what information should be subject to statutory restrictions against disclosure, especially by unauthorized or extralegal means. The other is to develop a system of adjudication that reduces the danger of unnecessarily compromising national security information in litigation. The two faces of the problem are quite different.

A. Protecting what against whom?

The first branch of the problem involves the deliberate, surreptitious disclosure of what have been variously termed "state secrets," "classified information," "restricted data," and so forth. For the sake of conformity, I shall refer to this information as "national security information." In this phase of the problem, the objective of the person disclosing the information is to achieve its dissemination, and it is to be distinguished from the second situation, which I shall discuss in a few moments, where the disclosure of national security information is incidental to some other proceeding, such as a civil or a criminal trial.

In the first category fall two distinguishable types of conduct: deliberate espionage and the official "leak." In coping with either espionage or with the leak, the first issue that Congress must address is the definition of information that should be subject to a substantive restriction against disclosure.

The Subcommittee is well aware of the array of objections to the current espionage statutes, which are quite cloudy in defining the contours of the information that is to be protected. In addition, those statutes are utterly ill-suited to the phenomenon of the official "leak." Although the selective leaking of the otherwise secret government information is as old as our Republic—and is probably as old as secrecy itself—Congress has not really tried to come to grips with legislative restrictions on such conduct.

Pending before the Subcommittee is an almost dizzying variety of suggestions for the definition of legitimate "national security information" that should be protected against the spy and against the leaker. My own experience with classified information, as with other information arguably subject to some governmental privilege, is that government officials tend to err far on the side of secrecy when they come to designating information they want to withhold. Often, it is difficult to discern the basis for a classification.[1] I suggest that the balance should

[1] I acknowledge that my first-hand experience predates the new executive order governing the classification process, but I would be surprised to learn that human nature has changed dramatically.

be legislatively tipped in the other direction—much as the Freedom of Information Act now does—and the presumption ought to be that information is disclosable unless there is an articulable basis for shielding it.

I would urge the Subcommittee, if it decides to fashion legislation on this subject, to propose a narrow formulation, rather than one that is open-ended. Such a formula could then be tested against any concrete examples that may be furnished by the defense, foreign policy, and intelligence communities of other types of information that must be kept secret. At the drafting stage, the burden of persuasion should be placed on those experts to produce real instances and substantial reasons showing why more expansive coverage should be given in defining protected "national security information."

The Subcommittee should also be sensitive—as I know it will be—to the deep policy implications of enacting anything remotely resembling an Official Secrets Act, a law that makes mere disclosure of official information a crime. There is a natural tendency to reach for that deceptively alluring solution to a complex and important problem. This country, however, has had several chapters in its history in which a desire for security was allowed to submerge our concern for personal liberties of speech, press, and travel. Those episodes are now regarded with shame, and must not be repeated. National security is, of course, a legitimate and indeed a compelling goal of any government, but Congress must not, in the course of striving for security, loose sight of the nature of the society in which we want to be secure. It bears repeating that the Preamble to the Constitution says that one of the goals of the Union is to "*secure the Blessings of Liberty* to ourselves and our Posterity." What the Congress should be most concerned about securing, therefore, when there is a tension between freedom and security, is our personal liberties. There are great dangers to any proposal that seeks to avoid difficult questions of subjective intent and probable effect by making them wholly irrelevant.

The shades of intent underlying disclosures of national security information are best illustrated in the "leak" context. The effort to regulate "leaking" must necessarily be a vexing one. First, as the Committee may fairly assume from my position in the *Nixon Tapes Case*,[2] I am instinctively skeptical about governmental claims to secrecy, and I believe that they should be given the narrowest possible cabin. The First Amendment reflects the two underlying postulates of our democratic society: that the people—not the government—are ultimately responsible for the course of their society, and that, in order to make informed choices, the people must have adequate current access to pertinent information. As St. John put it in a somewhat eschatological context: "And ye shall know the truth, and the truth shall make you free."[3]

Second, the use of the term "leak" tends to oversimplify the range of motives and consequences that may be involved. The leak is sometimes used as a technique of government policy, sometimes to inform the public "off-the-record." Often, however, it is used to provide a selective view of a message the government wants to convey. At the other end of the spectrum, a leak may come from a disgruntled government employee who concludes that only public knowledge will divert the government from a policy that he feels—rightly or wrongly—is folly.

One mechanism for reconciling some of these divergent interests is to provide a procedure by which a person may obtain prompt administrative review of a classification that would otherwise restrict disclosure. The existence of that type of safety valve would, I believe, fairly permit Congress to be somewhat more embracing in its definition of the categories of national security information.

I have only one suggestion to make about that definition. Many of the reasons for public disclosure of government information apply to policy-related information, not to details. Thus, for example, the public might have a legitimate right to know that the Defense Department is developing a new weapons system like a neutron bomb, in order to assert an intelligent judgment about the nontechnical implications of that course. But there would be little justification for concluding that the scientific and engineering plans for such a device should similarly be disclosable. This kind of distinction might also put into separate categories the disclosure of the general existence of intelligence abroad, on the one hand, and disclosure of the names of active intelligence operatives or

[2] *United States* v. *Nixon*, 418 U.S. 683 (1974).
[3] St. John 9:32.

sources in particular countries, on the other. The distinction may be easier to state in the abstract than it would be to apply in practice, but I suggest it as a starting point in determining what should be secret and what should not be.

B. To proceed, or not to proceed? That is the question

The other major facet of the problem before the Subcommittee involves the disclosure of national security information in the course of legal proceedings. Here, too, the general issue can be subdivided into two distinct situations. One is where the government itself must use national security information in the course of a proceeding in order to prove a material fact. The other, sometimes called "graymail," involves the threat or demand by the other party to the litigation—often, but not always, a defendant in a criminal case—to have national security information disclosed in the course of the proceedings. In either situation, the government may be confronted with the "disclose or dismiss" dilemma in which the government must either compromise national security by disclosing sensitive information or else forego the effort to vindicate the public's legal rights.

In a statement I submitted in March 1978 to the Subcommittee on Secrecy and Disclosure of the Senate Select Committee on Intelligence,[4] I addressed some of these questions at length and made a number of suggestions for avoiding or resolving that dilemma. Some of my recommendations involved steps that might be taken by the Executive Branch, with the cooperation of the courts. Others might require a legislative action. I was pleased that, when the Senate subcommittee released its report, it endorsed some of the suggestions that other witnesses and I made for more imaginative and aggressive action within the Executive Branch.[5] I shall not repeat that testimony. Instead, I am submitting a copy of my prepared statement as an addendum to my testimony this morning.

Several additional points, however, are in order. In my statement last March, I commented that the Department of Justice had not taken the available steps to avoid the dilemma that had apparently been the basis for the Department's failure to proceed with a number of otherwise justifiable criminal prosecutions. Since that time, the reins of the Criminal Division have been taken over by my former colleague in the Special Prosecutor's Office, Philip B. Heymann, and I have noted a dramatic shift of position. Assistant Attorney General Heymann is thoughtful, sensitive, and knowledgeable, and is concerned with reconciling civil liberties and criminal justice. His experience with the problems of national security information in litigation springs in large part from the same cases as does mine, and he is actively exploring realistic approaches to the problems.

The Subcommittee is no doubt aware that the Department of Justice has recently been taking steps, with varying degrees of success, to obtain court orders—in the form of protective orders—that will protect the important constitutional rights of the accused while at the same time protecting the government's legitimate interests in national security information. Useful protective orders were entered in the CIA spy satellite espionage trial,[6] in the FBI break-in case,[7] and the Humphrey/Truong espionage case.[8]

In the ITT perjury case,[9] the district judge initially granted a protective order prohibiting the defendant or his lawyer from disclosing, without prior court approval, the information contained in classified CIA documents he was allowed to review as part of pretrial discovery. But the judge has recently denied a further protective order that would establish a procedure for in camera screening of any classified information the defendant might want to disclose at trial. The government petitioned the United States Court of Appeals for the District of Columbia Circuit to issue a writ of supervisory mandamus directing the district judge to establish fair and orderly procedures for this purpose. The Court of Appeals, however, denied this petition on January 26, 1978.[10] The government's briefs in the

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[4] "The Use of Classified Information in Litigation." Hearings before Senate Select Committee on Intelligence, Subcommittee on Secrecy and Disclosure, 95th Congress, 2d session 53–81 (1978).

[5] "National Security Secrets and the Administration of Justice," Report of Senate Select Committee on Intelligence, Subcommittee on Secrecy and Disclosure, 95th Congress, 2d session 26–32 (1978).

[6] *United States* v. *Kampiles* (N.D. Ind. Crim. No. HCR 78–77).

[7] *United States* v. *Gray, et al.* (D.D.C. Crim. No. 78–000179).

[8] *United States* v. *Humphrey, et al.* (E.D. Va. Crim. No. 78–25–A.).

[9] *United States* v. *Berrellez* (D.D.C. Crim. No. 78–00120).

[10] *In Re United States* (D.C. Cir. No. 78–2158). The Court of Appeals held that the protective order was not properly reviewable by the extraordinary mandamus procedure.

One of the defendants in the FBI break-in case (*United States* v. *Gray*) has recently petitioned the Court of Appeals for similar mandamus review of the protective order in that case.

court of appeals provide an excellent compilation of the case law supporting the constitutionality of the proposed screening procedure.

Review of the various protective orders that have been entered or sought will show that there are some common features, like a limitation on further dissemination of classified information obtained in discovery, but there are also a number of variables. In order to standardize the proceedings in which national security information may have to be used, it would be worthwhile for Congress to enact formal standards and procedures for cases of this type.[11] While Congress cannot eliminate the constitutional questions that may be raised, I believe the courts will accord substantial deference to the choices Congress makes, if it develops a careful and balanced procedural scheme.

A comprehensive approach to this issue would include a number of features. At the outset, Congress should designate the official who, short of the President, will have the primary authority within the Executive Branch to resolve the disclose-or-dismiss dilemma if it becomes necessary to address it. I believe the Attorney General is the proper official to make that judgment because his responsibilities to enforce the law comprehend the more specific statutory obligations given to other federal officials, like the Director of Central Intelligence.

In addition, Congress should reinforce the Attorney General's right to access to any information in the government's possession that he considers necessary to the discharge of his responsibilities. He should be required, however, to consult with the affected agencies with a view toward achieving a fair prosecution with a minimum adverse impact on national security concerns. This requirement should be axiomatic, but there is no reason not to guarantee the national security community this opportunity.[12]

The Federal Rules of Civil Procedure and Criminal Procedure can be amended to require pretrial notice of an intent to use national security information, either by the prosecution or by the defense, so that adequate protective conditions may be established and screening of the material can be conducted. Building on the existing statutory provisions for government appeals from suppression orders,[13] Congress should allow the government to appeal from a disclosure order upon certification by the Attorney General that the disclosure might cause grave injury to the national security.[14]

The Congress should also consider establishing special procedures when national security information must be used at a trial. As explained in my Senate statement last year, there are at least certain kinds of proceedings that may be conducted *in camera*.[15] To the extent that the constitutional right to a public trial may give either the defendant or the public the right to open proceedings,[16] it might be possible to provide that the documentary evidence be maintained under seal and shown only to the jury. It might also be appropriate to permit a brief delay before the commencement of a trial in order to allow the government to determine whether it has cause to believe that any of the prospective jurors may not be able to safeguard national security information that comes into their possession is the course of a trial. Those jurors would then be subject to challenge. It also seems to me well within the legitimate powers of a court to place counsel and the jury under an injunction of secrecy, with care being taken to impose the minimum restraint necessary to protect the most sensitive national security information.

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[11] Indeed, the Court of Appeals' recent refusal to overturn by mandamus the district court's denial of a further protective order in *Berrellez*—thereby effectively denying the government the opportunity to appeal the district court's decision—underscores the need for congressional action laying down reasonably clear guidelines for district courts and litigants in this area.

[12] The problem of reconciling a criminal prosecution with national security concerns is not new. See, for example, Anders, The Rosenberg Case Revisited: The Greenglass Testimony And The Protection Of Atomic Secrets, 1978 American Historical Review, 388.

[13] 18 U.S.C. 3731; D.C. Code Sections 11721(a)(3) & 23–104.

[14] The need for a statutory appeal process for such orders—and the inadequacy of mandamus as a means of appellate review in these cases—is highlighted by the District of Columbia Circuit's denial of the Government's mandamus petition in Berrellez. See note 10, supra.

[15] See Hearings, supra note 4, at 57–58.

[16] The Supreme Court now has before it the constitutionality of a court order excluding the public and the press from certain portions of a criminal proceeding, where there was a concern about generating prejudicial pre-trial publicity. See *Gannett Co.* v. *DePasquale* (Sup. Ct. No. 77–1301) (argued Nov. 7, 1978; see 47 U.S.L.W. 3330). For quite different views of this problem, *compare Gannett Co., Inc.* v. *DePasquale*, 43 N.Y. 2d 370, 401 N.Y.S. 2d 756, 372 N.E. 2d 544 (1978), cert. granted, U.S.L.W. 3679 (U.S. May 1, 1978) (No. 77–1301), with *United States* v. *Cianfrani*, 573 F.2d 835 (3d Cir. 1978).

Finally, Congress should consider establishing a rule of evidence to cope with national security information. To the extent the information is relevant, a number of options—subject to court supervision—seem feasible. One would be to permit the government to produce a concession or stipulation about the basic substance of the information without actually producing the information itself. In many instances, a description of the nature of the material, without letting out its specifics, may sufficiently cover the point that a defendant may be entitled to make.

As a further alternative, Congress could draw upon the "missing witness" instruction as a parallel, and could authorize the court to instruct the jury to infer from the failure to produce information that the information would tend to establish the fact asserted by the defendant. Or, going one step beyond that instruction, the jury might be told that it must take as established a particular proposition advanced by the defendant. Rule 37(b) of the Federal Rules of Civil Procedure suggests a number of alternative sanctions for failure to make discovery in a civil case, and there is no compelling reason why that approach may not be borrowed in a criminal case as well.

Furthermore, Congress may develop the point made by Rule 403 of the Federal Rules of Evidence, which permits relevant evidence to be excluded if its probative value is "substantially outweighed" by certain other considerations. Congress could consider modifying that rule of evidence to provide that the risk of grave injury to the national security is one of those considerations.[17]

In the last year alone, we have witnessed a number of federal cases in which national security information played, to one degree or another, a part in the proceedings. We can only surmise that there are other cases that should have been brought but were not because of the apparent security risks in attempting to proceed. With this recent experience in mind, there seems to be ample justification for this Subcommittee to develop a comprehensive legislative package that will deal with the issues I have addressed.

Appendix B

Statement of Philip A. Lacovara, Partner, Hughes Hubbard & Reed, Washington, D.C.

"Investigating and Prosecuting Federal Offenses When National Security Information May Be Involved"

I am appearing this morning at the Subcommittee's invitation to offer my views on the problems that are encountered in investigating and prosecuting criminal cases involving national security information. In commenting on these problems, I draw on my experience in the Department of Justice, where I served as Deputy Solicitor General in charge of the government's criminal and internal security cases before the Supreme Court, and as Counsel to Watergate Special Prosecutors Archibald Cox and Leon Jaworski. Several of the investigations undertaken by the Special Prosecutor's Office, especially the investigation of the break-in by several of the White House "Plumbers" at the office of Daniel Ellsberg's psychiatrist, touched upon these problems.

1. Relationship between national security and prosecutorial discretion

The prosecution of a federal offense invariably involves a continuing series of discretionary judgments, beginning with the decision whether to open an investigation and extending through the decision how to deliver the final summation at the trial. At each stage, concern about "national security" considerations may affect the judgments that are made. I wish to emphasize at the outset that, although many abuses have been committed in this country in the name of "national security"—over a period going back more than thirty years—the goal of protecting national security is certainly legitimate. Accordingly, it is no more objectionable for any federal prosecutor, ranging from an Assistant United States Attorney to the Attorney General, to weigh genuine national security interests

[17] Compare *Davis* v. *Alaska*, 415 U.S. 308 (1974).

than it is for a prosecutor to evaluate the countless other variables that inform the exercise of prosecutorial discretion.

There are two distinct types of situations in which national security factors may complicate a federal criminal case. The first involves the risk that the very initiation of an investigation or a prosecution will compromise some national secret or intelligence method. For example, the opening of an investigation may destroy the cover of an undercover operative, or may confirm the importance of purloined information. These are inherent risks and are beyond the scope of my remarks.

The second type of impact can come from the disclosure of classified information that might be required at a trial. If the information is so sensitive that the damage to the national interest would exceed the public interest in prosecuting the offense, the prosecution would have to be aborted. Apparently, there have been instances in which anticipated disclosures at a trial were so grave that even a full investigation of an alleged offense was deemed pointless.

2. EXISTENCE OF ALTERNATIVES TO "DISCLOSE-OR-DISMISS" DILEMMA

My objective today is to suggest that the appearance of a national security feature in a federal investigation or prosecution should not be regarded as a "stop" sign, but rather as simply a flashing "caution" warning. If the Department of Justice proceeds with a little sensitivity and a modicum of imagination, the involvement of some national security component need not erect an impassable roadblock to the pursuit of a federal offense that *otherwise* merits investigation and prosecution. Before any final judgment is made that national security imperatives outweigh the public interest in enforcing the criminal law, a number of alternatives can be explored to avoid confronting that ultimate dilemma.

Congress has the responsibility, I submit, to devise procedures and standards that will reduce the occasions on which officials of the Executive Branch must address the dilemma. I have the sense that the government may be aborting cases prematurely or unnecessarily because of a failure to press the alternatives to their fullest, as we did, for example, in the Special Prosecutor's office in the Ellsberg break-in prosecution, where defense efforts to use "national security" threats to stymie the case were beaten in the courts. In addition, when the close calls have to be made, it is important to identify the official with the responsibility to weigh the alternatives, and to equip him with some policy priorities. On each of these issues, the government's present practice may be deficient, and there may be room for congressional action.

The need to introduce national security information as evidence in a criminal trial, and hence the necessity of disclosing it to unauthorized persons, most obviously arises in espionage prosecutions for illegal transmission or disclosure of classified information. As long as the basic elements of the offense defined by Congress include the element of injury to national security, the government must place evidence before the jury to establish that element. In addition, the defendant is entitled to place rebuttal evidence before the jury. There may be no practical alternative to production of classified evidence in an espionage case, unless Congress is prepared to take the controversial step of enacting an official Secrets Act under which the fact of classification is critical, not the underlying nature of the information.

Similar problems can arise in numerous contexts other than espionage cases, and are easier to deal with in those other contexts. The most recent example receiving widespread public attention was the plea bargain arranged with former Director of Central Intelligence Richard Helms. In that case, Helms was under investigation for possible perjury committed in congressional testimony about covert CIA operations abroad. The Justice Department accepted his plea of nolo contendere to the lesser offense of refusing to testify candidly before a congressional committee, explaining: "the trial of [his] case would involve tremendous costs to the United States and might jeopardize national secrets."

In those criminal cases that require disclosure of classified information, the prosecutor is faced with the very difficult choice either to drop the case or jeopardize, to a greater or lesser extent, American national security. As the Congress develops tighter legal restrictions on our intelligence agencies, cases presenting this dilemma are likely to occur with increasing frequency.

Based upon my experience, the dilemma is often a false one, because on close examination much or most classified information is overclassified. Thus, its disclosure at a trial, if necessary, would not present truly grave risks of jeopardiz-

ing our military security. The intelligence community resolutely opposes any public disclosure of classified information, and that attitude is understandable because the mission of those agencies is to obtain and maintain secrets. While I hardly mean to deny the general propriety of protecting the secrecy of defense information, I do suggest that prosecutors should be skeptical about the adverse consequences that would allegedly flow from the disclosure of the limited amount of classified information that might be necessary to sustain a major prosecution.

The main thrust of my statement, however, is that in many instances it may not even be necessary to reach the "disclose-or-dismiss" dilemma. I believe that various substantive and procedural mechanisms can be utilized to pursue otherwise appropriate prosecutions without jeopardizing the national security. I would like to devote the rest of my statement to discussion of these possible mechanisms.

There are two basic approaches to avoidance of the dilemma: (A) reliance on substantive doctrines of law to obviate the need to produce classified data at a trial, and (B) use of special procedures to resolve disputed issues without *public* disclosure of any national security information that must be considered. Some of these options are currently available; others would take legislative action. I cannot emphasize too strongly, however, that the decision to restrict or abort an otherwise meritorious prosecution should rarely, if ever, be made until all substantive and procedural alternatives are exhausted, and this may involve exercise of the government's right to appeal from adverse decisions made initially by the trial judge. See 18 U.S.C. 3731.

A. Avoidance of dilemma by reliance on principles of substantive law

On the substantive level, the key issue is one of relevancy. A purported risk of disclosure of sensitive information can be avoided if the information is not truly relevant to any material issue in the trial. In that event, the government need not produce it, and can counter a defendant's *in terrorem* threat to introduce it by insisting that the information be excluded from evidence. *See* Rules 401 and 402, Federal Rules of Evidence. The government can insist, for example, on a precise interpretation of the relevancy of the sensitive information to the trial. This was the approach taken by the Watergate Special Prosecutor in *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974), *aff'd*, 546 F.2d 910 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977), the prosecution resulting from the break-in at the office of Daniel Ellsberg's psychiatrist.

Prior to the return of the indictment in that case, some defense counsel warned us that they would force into the public trial record the most highly classified defense information. Thus, they argued, an indictment would be aimless because we would certainly have to abandon the prosecution rather than permit the disclosure of the data. It was a worthwhile strategy, but we concluded we were not faced with any imminent dilemma. We satisfied ourselves that an indictment was otherwise appropriate and that there were alternatives that could properly neutralize the defense strategy.

After the indictment was returned, the defendants did in fact demand the production of highly classified files, including nuclear missile-targeting plans. The defendants were seeking to utilize discovery to obtain national security information in order to support the purported defense that they believed the break-in was justified by national security concerns. The Special Prosecutor argued, however, and both District Judge Gesell and the U.S. Court of Appeals for the District of Columbia Circuit agreed, that the information sought was irrelevant because "good faith" motivation was not a valid defense against the crime charged, a conspiracy to violate Fourth Amendment rights. Thus the difficulty of choosing between forfeiting an important criminal prosecution or disclosing information potentially damaging to our national security was avoided.

I suggest that there are a number of other types of cases, where there has been a supposed risk of disclosing secret material, that actually parallel the Ellsberg break-in case. For example, in a perjury case, it is highly doubtful that the defendant is entitled to introduce background information of a classified nature designed to show what his false answers were designed to conceal. Motive is simply not a material issue in such a case, and the classified information thus is not relevant at the trial.

The new Federal Criminal Code expressly recognizes that proposition. Section 1345(d) of S. 1437, 95th Cong., as it passed the Senate on January 30, 1978, precludes a defense in a false-statements prosecution that, in a closed congressional

session, a false answer was necessary "to prevent the disclosure of classified information or to protect the national defense." This explicit provision, of course, does not necessarily define the maximum limits of situations in which a "national security" defense can and should be precluded. Congress can certainly use its power over the definition of the elements of federal crimes, and over the permissible defense to them, to deal more comprehensively with this problem.

Another substantive legal doctrine of possible use to avoid disclosure of classified information is the assertion of a claim of privilege. The Supreme Court has recognized the validity of an absolute privilege for national security information in the context of a civil case against the government. See *United States* v. *Reynolds*, 345 U.S. 1, 6–7 (1953). The scope of the government's right to withhold national security information as privileged in a criminal case is not yet settled. In the Nixon tapes case, the Supreme Court refused to find the President's claim of a generalized executive privilege broad enough to justify withholding the tapes from the Special Prosecutor for use in a criminal trial, but strongly implied that a privilege claim based on military or diplomatic secrecy could prevail in such a situation. *United States* v. *Nixon*, 418 U.S. 683, 710–11 (1974).

Further definition of this "state secrets" privilege is in the hands of the Congress. The proposed Federal Rules of Evidence originally promulgated by the Supreme Court included a rule defining a privilege for state secrets, but Congress found all the proposed rules dealing with privileges unacceptable and rejected them. In dealing with the problem of disclosure of national security information in criminal litigation, I suggest it would be advisable for Congress to set specific standards for the scope of a "state secret" privilege.

In any case in which a court sustains a claim that national security information is priviliged, the problem then posed is to determine the effect of the privilege on the further progress of the case. The proposed rule of evidence promulgated by the Supreme Court provided that if a valid claim of privilege by the government deprived the opposing party of material evidence, it would be up to the judge to determine what further action was required in the interests of justice, including striking a witness' testimony, finding against the government upon the issue as to which the evidence is relevant, or dismissing the action. *See* 2 J. Weinstein, *Evidence* ¶ 509 (1977). The proposal simply restated the flexible discretion possessed by a trial judge. Under the Federal Rules of Criminal Procedure, for example, a trial judge has an array of sanctions he can impose in the event the government fails to comply with a discovery request. *See* Fed. R. Crim. P. 16(d)(2). But it is vital to note that dismissal of the case is neither necessary nor likely in most situations in which information is withheld on the ground of the privilege for state secrets.

The courts, although finding dismissal necessary in some cases following a valid claim of government privilege, have not held dismissal mandatory in all cases. In the analogous area of the government's assertion in a criminal case that the identity of an informer is privileged, for instance, the Supreme Court has held that whether disclosure is essential to the continuing viability of the case depends on "balancing the public interest in protecting the flow of information against the individual's right to prepare his defense." *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957). Thus the defendant may not compel dismissal when the government refuses to disclose the identity of an informer in the context of determining whether probable cause existed for a search or arrest, *McCray* v. *Illinois*, 386 U.S. 300 (1967), or when the defense to which the information may be relevant is merely speculative. *United States* v. *Ortega*, 471 F.2d 1350 (2d Cir. 1972), *cert denied*, 411 U.S. 948 (1973).

Accordingly, when the government makes a legitimate claim that national security information is privileged, the remedy available to the defendant would vary depending upon the circumstances of the case. At one end of the scale, for example, if the defendant's possible use for the information is totally speculative, the case simply could continue without disclosure. At the other end of the scale, where the information is central to the question of guilt or innocence and where no other alternative to public disclosure is possible, dismissal may be necessary. In between, procedures such as instructing the jury to assume that the missing information would have proved a given proposition may be possible. Certainly the Department of Justice should press for some intermediate treatment like that before deciding that the case must be abandoned.

This approach illustrates another area in which congressional action would be useful. Congress has authority to define rules of procedure and to prescribe a slid-

ing scale of sanctions. It would be useful for Congress to establish a formal policy that directs the courts to reserve dismissal for instances in which non-production of classified information poses a substantial threat to a defendant's due-process right to a fair trial.

B. Availability of procedures avoiding or restricting disclosure

In addition to those substantive bases for avoiding the disclose-or-dismiss dilemma, several procedural mechanisms can be used to reconcile the accused's right to a fair trial with the public interest in maintaining legitimate state secrets. The most obvious technique to insure protection of classified information during criminal litigation is the *in camera* proceeding.

I readily acknowledge a well-founded abhorrence for secret trials. The Sixth Amendment to the Constitution expressly guarantees the accused the right to a public trial. The courts have long recognized, however, that the right of a criminal defendant to a public trial, or even to be present at certain kinds of hearings, is not absolute or all-embracing. Recognizing the competing interests at stake, the Supreme Court has already indicated that in the area of electronic surveillance conducted for national security purposes, a court properly may determine in an *in camera, ex parte* proceeding whether the electronic surveillance was lawful, *Giordano* v. *United States*, 394 U.S. 310, 314 (1969) (Stewart, J., concurring), or whether the defendant has standing to challenge the surveillance, *Taglianetti* v. *United States*, 394 U.S. 316, 317–18 (1969) (per curiam). The same type of proceeding is also permissible to determine the relevancy of material sought from the government by a criminal defendant through discovery procedures. *See United States ex rel. Williams* v. *Dutton*, 431 F. 2d 70, 71 (5th Cir. 1970).

Pursuing these principles, it would be possible, in many criminal cases involving classified information, to have the court act *in camera* to decide preliminary issues, including discovery requests and admissibility of evidence, that involve the risk of disclosure. This was precisely the approach upheld by the United States Court of Appeals for the Eighth Circuit in *United States* v. *Bass*, 472 F. 2d 207, 211 (8th Cir.), *cert. denied*, 412 U.S. 928 (1973), a criminal prosecution for making fraudulent statements with respect to parts supplied by a subcontractor to an Air Force contractor. The court of appeals approved the lower court's *in camera* inspection of the contract to determine whether portions of the contract that were deleted by the government as involving confidential military secrets were exculpatory or otherwise relevant to the trial.

In other cases involving the risk of disclosure of sensitive information, the use of limited *in camera* procedures, allowing either defense counsel alone or defense counsel and the defendant to be present, may be sufficient to protect the information while respecting the defendant's rights. To illustrate, the courts have approved the exclusion of both the public and the defendant from limited segments of criminal hearings in order to protect the confidentiality of the "hijacker profile" developed by the Federal Aviation Administration. *See United States* v. *Bell*, 464 F. 2d 667, 670 (2d Cir.), *cert. denied*, 409 U.S. 991 (1972). The public has been excluded from portions of a trial in order to preserve the confidentiality of undercover narcotics agents. *See United States ex rel. Lloyd* v. *Vincent*, 520 F.2d 1272, 1274 (2d Cir.), *cert. denied*, 423 U.S. 937 (1975). This type of procedure is ideally suited for cases in which the defendant is a present or former official who probably had prior personal access to the information. In that situation, there is a minimal incremental risk from exposing the sensitive information to the defendant or his counsel. Even in other cases, the use of *in camera* hearings on preliminary questions of admissibility of evidence, coupled with carefully designed protective orders, could greatly reduce the potential harm of general public disclosure of sensitive information.

The problems I have just discussed involve production of information that may be classified, especially information from the government's own files. There is a distinct problem, however, where the defendant himself threatens to disclose classified information during his trial—or at least is in a position to do so. It is my view that if the information is not otherwise relevant, the trial judge may properly forbid the defendant's testimony about it.

We are generally loathe to muzzle a defendant testifying on his own behalf, but even the defendant is bound by the rules of law governing the conduct of a criminal trial, including the rules of relevancy. My view on this problem is supported, I believe, by decisions like that of the District of Columbia Circuit in *United States* v. *Gorham*, 523 F.2d 1088 (D.C. Cir. 1975). In that case, a piece of potential evidence, a note signed by a prison official during a prison uprising stat-

ing that none of the prisoners would be prosecuted, was held to be irrelevant. The defendants argued, however, that it should be admitted as evidence so that the jurors might use it in order to reach a verdict based on their "consciences" rather than on the law. Although a jury has the power to render a verdict at odds with the evidence and the law, the court held that the defendant does not have a right to present to the jury any evidence solely relevant for the purpose of inducing such an extra-legal verdict. 523 F.2d at 1097–98. Further analogous support is furnished by the unanimous position of the federal courts that a defendant has no right to an instruction to the jury that it may render such a verdict. *See, e.g., United States* v. *Dougherty*, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972).

By similar reasoning, a defendant in a trial involving national security information could be ordered not to testify about sensitive information that has been held to be irrelevant or privileged by the judge, even though the testimony conceivably could have a beneficial "extra-legal" effect on the jury for the defendant. The proper place to rely on such information, if it tends to mitigate the accused's acts, would be during sentencing, where the judge can receive it *in camera* and evaluate its significance for purposes of fashioning the appropriate sentence.

All of these procedural devices would be more effective if Congress required that the proposed disclosure of classified information by the defense be made the subject of pre-trial notice and hearing. Rules 12.1 and 12.2 of the Federal Rules of Criminal Procedure contain somewhat similar directives. Under Rule 12.1, a defendant who intends to rely on an alibi defense must, upon demand by the government, provide pre-trial notice of that intent and must supply details of the circumstances and supporting witnesses. The Supreme Court has upheld such rules against constitutional attack. *See Williams* v. *Florida*, 399 U.S. 78 (1970). Under Rule 12.2, a defendant who may wish to rest on an insanity defense must provide similar notice and information. Creation of a comparable rule where the defense intends to use classified information would greatly facilitate the informed handling of those cases.

Furthermore, an additional procedure should be designed to lay out the ground rules for the trial before it begins. This would give the government the opportunity to decide, before a jury is empaneled and jeopardly attaches, whether any required disclosures outweigh the public interest in proceeding, whether protective procedures are adequate, and whether interlocutory appeals from trial court rulings are in order. *See* 18 U.S.C. 3731. The special statutory procedures for screening evidence derived from electronic surveillance, 18 U.S.C. 2519(9) and (10), 3504, statements of government witnesses, 18 U.S.C. 3500, and confessions, 18 U.S.C. 3501, provide ample precedents for creation of procedures dealing with the use of national security information in criminal cases.

3. RESOLVING THE DILEMMA: WHO DECIDES?

Before closing I also would like to address the problems that arise from the potential conflict in authority between the Attorney General and the Director of Central Intelligence. Each of them may lay a plausible claim to final authority over the decision whether or not to prosecute an offense when the trial may involve disclosure of national security information.

At the outset, it is important to recognize that the power to prosecute and the related power to decide not to prosecute are vested solely in the Executive Branch of the government, and its decisions are not generally reviewable by the co-ordinate branches. *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1869); *United States* v. *Cox*, 342 F. 2d 167 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); *United States* v. *Cowan*, 524 F.2d 504 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976). In all but the most unusual circumstances, this Executive power to prosecute—or not to prosecute—is exercised by the Attorney General through his subordinates in the Department of Justice. *See, e.g.*, 28 U.S.C. 515, 516. *Compare United States* v. *Nixon*, 418 U.S. 683 (1974)

Congress has specifically provided in 28 U.S.C. 535(a) that the Attorney General has the authority to investigate violations of the federal criminal code by government employees. To underscore this responsibility, agency heads are directed to report "expeditiously" to the Attorney General any information concerning criminal misconduct by government employees. 28 U.S.C. 535 (b). Thus, the heads of other agencies are not normally free to decide whether their subordinates should be prosecuted for apparent violations of the law.

Congress, however, has given the Director of Central Intelligence the statutory responsibility to protect intelligence sources and methods from unauthorized disclosure. National Security Act of 1947, 50 U.S.C. 403g. In specific cases, the

Director may view this responsibility as conflicting with the Attorney General's authority to investigate and prosecute criminal violations because the prosecution could result in a disclosure of intelligence sources or methods.

As this Subcommittee is aware, this is not a hypothetical problem. In another forum[1] I have testified—critically—about the issues raised by a 1954 understanding between the Justice Department and the CIA under which the CIA was ceded the authority to investigate misconduct by its own employees. The Agency apparently has effectively blocked prosecutions by the Department of Justice of both government and non-government employees by simply "stonewalling" and refusing to allow the Justice Department access to the relevant information.

It would be worthwhile for the Congress to resolve this conflict and prevent future stalemates concerning the advisability of pursuing prosecutions that might lead to disclosure of government secrets. In my opinion, since the exercise of the Article II powers of the Executive Branch are involved, the proper disposition of this problem would be to provide for procedures under which the primary responsibility for a decision whether to prosecute would rest with the Attorney General, subject to the DCI's right to appeal to the President. It is the President who is, after all, both commander-in-chief and chief law enforcemment officer. If the Attorney General and the Director of Central Intelligence cannot agree, the matter is presumably immportant enough to call for Presidential resolution.

4. CONCLUSION

The problems under consideration by the Subcommittee in these hearings can never be totally eliminated. In order to continue to protect the rights of the individual defendant as well as the collective security of the nation, cases will arise requiring the almost imponderable choice between enforcing the rule of law and protecting some aspect of national security. Yet through the imaginative and diligent pursuit of alternatives like those I have suggested, it will often be possible to avoid grasping either horn of the disclose-or-dismiss dilemma. And perhaps when disclosure seems inevitable, it may not really portend national disaster.

Mr. LACOVARA. Thank you, sir.

My statement this morning attaches to it the testimony that I have given previously before this subcommittee, as well as the statement that I gave last year before the Subcommittee on Secrecy and Disclosure of the Senate Intelligence Committee, and together these statements make a package that sets forth my views on what the nature of the problem is and what reasonably should be done to cope with it.

One of the threshold questions, of course, is: Is it worth while for the committee to bother with legislation? Some people have suggested that there is nothing terribly dramatic or new in these legislative proposals and that the Federal courts already have the power to come up with some of these alternatives and sanctions. In a sense, that observation is accurate, but I think it misses the point.

It is true that the Federal courts today, under the Federal Rules of Evidence and the Federal Rules of Criminal Procedure, have some of the flexibility to do the things that might help avoid the "disclose or dismiss" dilemma and thus avoid aborting otherwise worthwhile criminal prosecutions while at the same time protecting the defense interests. What we have seen, though, over recent years, has been a lack of consistency, a lack of will, and a lack of imagination on the part of many Federal trial judges, and I think for that reason, and perhaps principally for that reason, it is important for Congress to lay down in a systematic fashion what Congress believes should be the steps that are taken to avoid the needless frustration of criminal prosecutions.

[1] Statement, "Prosecutorial Agreements Between the Department of Justice and Other Federal Agencies," before the House Government Operations Subcommittee on Government Information and Individual Rights, July 23, 1975.

Each of these bills attempts to do that, and I think the attempt is quite worth while.

On that same subject, Mr. Chairman, it is true that the number of cases that are affected by this problem each year is a relatively small number, but I still submit that legislation is warranted because the cases tend to be of unusual public importance. Whether the matter involved is espionage, major drug trafficking, or misconduct by senior Government officials, the underlying prosecution is one in which the people of the United States have a peculiarly grave interest in seeing to it that there are no unnecessary obstacles to going forward with a trial on the merits to determine guilt or innocence.

So I think legislation is amply justified, and the committee's efforts in this regard, I think, are a quite justifiable and important endeavor.

The comment that Federal judges already have some of these powers I think also tends to show why the bill ought not to be controversial. Few of the devices that are proposed in either of these bills is wholly new or radical. What we have here is a synthesis of techniques that are currently available to Federal judges if only they had some consistent approach and some incentive to go at the process in this way. My statement explains why I believe each of the major devices, including pretrial notification by the defense of its intent to use classified information, in camera and sometimes ex parte screening, and other similar techniques including interlocutory appeals by the United States, have precedents in existing provisions of Federal law. This attempt, as reflected in these two bills, is an effort to borrow from those analogous situations to make a comprehensive system for handling this "disclose or dismiss" problem.

I think the concepts, in the main, are properly adjusted to deal with this situation.

I am not going to belabor the subcommittee's time this morning with some of the technical drafting suggestions that I have made in my statement, which I think are necessary to make sure that the balance between Government interests and defense interests is properly struck. Some of the phrasing in the legislation may seem too broad and imprecise and I have made a number of specific suggestions that I believe should be considered as drafting improvements.

One of the principal debates, as I conceive it from the testimony of some other witnesses, is whether or not it is fair and constitutional for the bills to provide that some of the screening to be done by the trial judges will be done in camera, and whether it is fair and constitutional to provide that the defendant will be provided with substitutes rather than with the original source material. For reasons that I explain at some length in my statement, I believe that the answer to both of those questions is in the affirmative, that it is appropriate in light of practical experience and prevailing case law to use these techniques for dealing with the disclose or dismiss problem.

There are a number of situations in which in camera proceedings are used, even under practice today. One of the exampes of such use involves the attempt to screen classified information. That, for example, came in the *Nixon Tapes* case where Judge Sirica was ordered to examine the White House tapes in camera to see whether or not certain material should be excised, including state secrets. This tech-

nique has also been provided by Congress in the Freedom of Information Act which, although it is a civil statute rather than a criminal statute, nevertheless reflects the judgment by Congress—and it is a judgment that I endorse—that trial judges have the competence to determine in classified documents what is relevant and what is not.

The same judgment about the competence of Federal judges to separate the relevant from the irrelevant in screening material in camera is also reflected in other statutes that Congress has passed in certain provisions of the Federal Rules of Evidence, and in general trial practice.

I believe that the experience with screening by judges in chambers has generally been satisfactory.

A related question that has been raised by some members of the defense bar is whether the excising from original material of certain information may in some respects limit the defense ability to use those documents for cross-examination. I believe that to the extent that there is some impact on the defense use of classified information through the provision of substitutes or summaries, that is a tolerable impact. Each of the bills, particularly if adjusted in the way that I have suggested, would put the responsibility on the trial judge to make a finding that the provision of substitutes would not substantially interfere with the defendant's right to a fair trial. I believe that this provides an adequate measure of protection for the defendant's interests, while reconciling the Government's interests in not permitting the gratuitous and unnecessary disclosure of classified information.

I think that it is a process that the trial judge will be competent to handle because he will be, if he follows the provisions of either of these two bills, reasonably familiar with the outlines of the Government's case and what the defendant contends he needs this information for, and thus will be in a position to make a practical judgment about the relevance of the proposed information and about the adequacy of the substitutes that may be tendered in lieu of the disclosure of the original classified information.

I emphasize that I suggest that the standards provided in each bill for that inquiry be changed. The bills at present provide that the judge is to make available a substitute unless it would be necessary for the defendant to have the original information. I suggest that that may tilt the balance a little bit too far in favor of the Government, and instead, I would suggest that the subcommittee substitute the following test, that the trial court agree to make available the substitutes in lieu of the original classified information "unless the court finds that no alternative will provide the defendant wtih substantially the same ability to prepare for trial or to make his defense as would the disclosure of this specific classified information." That inquiry, I believe, is the relevant one, it is the fair one, and I believe it is one that is totally free of serious constitutional objection. It is similar to the constitutional inquiry that the Supreme Court pursued in upholding the validity of the "use immunity" statute.

The subcommittee will recall that 8 or 10 years ago Congress enacted a statute that permitted the courts to displace a claim of fifth amendment self-incrimination by guaranteeing the defendant that whatever he said under compulsion would not be used directly or indirectly against him in a subsequent criminal proceeding. The Supreme Court

sustained that substitute protection as constitutional because it provided the defendant with substantially the same measure of protection as the constitutional clause itself was designed to provide.

I believe that analysis demonstrates the validity of the basic structure of each of these two bills. I do reiterate, however, that it would be important for the committee to use a substantial equivalence test rather than the "necessary" test.

There has also been some discussion about the Justice Department's proposal to amend the Jencks Act to require the court, upon the Government's request, to exclude irrelevant material that is classified and to add, as well, a provision that prior statements by a Government witness need not be disclosed if they are consistent with his testimony. Defense counsel have pointed out in that context that even relatively minor deviations may be useful in constructing cross examination. That, of course, is true, but what I said a few moments ago about the validity of preclusion of the use of marginally relevant information applies here. I think it is within congressional power to provide, for an adequate public interest, that merely marginal relevant information will be withheld. If the test under the Justice Department's proposal to amend the Jencks Act is modified in a way that I will suggest in a moment, I believe it would be permissible.

The modification is that the trial judge who, under this procedure, would have heard the Government witness testify already, must find not just that the prior statement which contains classified information is consistent with his testimony on the stand, but that it is fully consistent. I believe that adding that additional adverb will provide the defendant with the measure of protection to which he may be entitled in insuring that the judge isn't overlooking deviations or deflections that might have some significant use to the defense. This test, I think, would filter out the marginally useful from the significantly useful, and thus once again accommodate the Government's legitimate interests in secrecy and the defense interest in a fair trial.

The final policy point that I would like to address, Mr. Chairman, is raised by title II of the subcommittee's bill, H.R. 4736, the title dealing with congressional oversight in this area. The title requires the Attorney General to promulgate detailed standards for making the prosecutive judgment in cases in which classified information is involved. It also requires the preparation of detailed prosecution memoranda whenever there is a decision not to prosecute on these grounds, and it requires the automatic reporting of those memoranda to this committee and its cognate committee of the Senate.

Addressing the first provision, the requirement that the Attorney General promulgate standards for exercising discretion here, I have no objection in principle to that measure, but I must suggest to you in all candor that I think it is not likely to accomplish much. In my experience, the factors that are considered in making a prosecutive judgment are so multifaceted, and the weighing of each of those factors so imponderable that I believe it will not be useful to have a set of criteria that are purportedly guiding that decision. The criteria must either be so tight as to be hamstringing, or so vague as to be uninformative.

Not so much as an alternative, but by way of an addition, however, I suggest that the subcommittee consider what I think is the more signif-

icant issue within the executive branch in this field, and that is determining who within the executive branch has the ultimate responsibility, short of the President, for deciding whether to pursue an investigation or a prosecution. As the subcommittee knows, history is spotted with incidents in which there have been confrontations between the intelligence agencies and the Justice Department over access to classified information and on the decision whether to declassify information if necessary to sustain an investigation or prosecution. That conflict and tension has led, in some cases, even to the unwillingness of the Justice Department to bother going forward with an investigation because of the anticipated objections of the intelligence community.

For reasons that I have outlined in this statement and in some of my earlier testimony, I believe it would be quite desirable for the committee to define in statute that it is the Attorney General who has the ultimate responsibility for deciding on the extent to which he and his subordinates should have access to classified information, and it is he ultimately who, after consulting with the Director of Central Intelligence, should decide where the ultimate national interest lies in the event the "disclose or dismiss" dilemma must be confronted.

Addressing now the second basic provision of title II of the subcommittee bill, the requirement that detailed memorandums be prepared and furnished in every case to this subcommittee, there I would submit that the subcommittee bill goes too far. I think there is a legitimate question whether the Congress should define how the Justice Department mechanically makes a prosecutive decision within the Justice Department and what kinds of files should be kept. But beyond that prosecutive memoranda, which are almost inevitably going to be prepared anyway in the course of events, be forwarded automatically to the oversight committees seems to me to be an excessive encroachment on the independence of the Justice Department in making prosecutive judgments, and an excessive departure from the principle of separation of powers.

I do support the principle of congressional oversight, of course, as I believe the subcommittee is well aware, but I think the committee's interests and the congressional interests can be well enough protected without requiring a disclosure of the raw investigative files or the raw prosecutive memorandum on a routine basis.

What I suggest in lieu of the subcommittee approach and in addition to what the Justice Department is prepared to concede, is that Congress specify that whenever judgments not to prosecute are made because of this problem, the oversight committees be notified of the identity of the prospective defendant or the actual defendant and the nature of the offense for which he was under investigation or was being prosecuted.

In a specific case, then, the subcommittee can make a determination whether or not it wishes to pursue the reasons behind that individual judgment. I think that adequately provides the safety valve to see to it that this system that each of the bills would be setting up is being adequately pursued in practice without needlessly trenching upon what the Justice Department feels are its prerogatives.

Mr. McCLORY. You would just delete the language that requires the findings to include classified information?

Mr. LACOVARA. That would do it, Mr. McClory, so that there would be automatic reporting on the basic events without going into details about the classified information or the balancing process that the Justice Department went through.

In conclusion, Mr. Chairman, I repeat my remarks at the outset that I consider each of these two bills very useful and creditable efforts to resolve the "disclose or dismiss" dilemma. Each of them, I believe, should be subject to some significant modification that I have described in my statement, but I hope that the rather wide support for the general concept will encourage the subcommittee to pursue this effort through to legislation.

Thank you, sir.

Mr. MURPHY. Thank you, Mr. Lacovara.

The administration bill requires the Government to prove the national security sensitivity of the information at issue before an in camera hearing can be held. H.R. 4736, on the other hand, authorizes such a hearing upon the certification of the Attorney General that the information at issue is classified.

The question underlying these provisions is whether or not the court should hear arguments as to the national security sensitivity of the information before a decision on admissibility is made.

Mr. LACOVARA. I find the difference in the bills interesting because the subcommittee bill seems to allow more automatic power to the Attorney General than the Justice Department's own bill does.

I prefer the Justice Department approach. As I explain in some greater detail in my statement, Mr. Chairman, it seems to me that the danger of prejudicing the trial judge's ultimate ruling on admissibility or the adequacy of substitutes by the ex parte submission by the Justice Department of the explanation of the sensitivity of the information is relatively small. The judge is going to be exposed to that explanation by the Justice Department at some point in his deliberative process.

I do not think that it will measurably add to the possibility that his judgment on those other questions will be affected if he has this submission made to him earlier ex parte.

In trying to balance these two alternatives, as I explain in my statement, I would rather not give the Justice Department the power to trigger an in camera hearing automatically. I would rather that they have a burden to meet to justify the holding of what is still an unusual procedure, although by no means unprecedented. So for that reason I support the administration bill's approach rather than the subcommittee's approach.

Mr. MURPHY. Mr. McClory.

Mr. MCCLORY. Thank you very much.

First of all, I would like to express my appreciation for your testimony. It is consistent with the high quality of testimony which you provided last year in connection with the electronic surveillance legislation, which unfortunately the Congress saw fit to pass, notwithstanding the very balanced presentation which you made, and some of which I adopted in arguing against the enactment of that bill. You do bring a scholarly, balanced, and unemotional approach to legislation and legislative work, and I personally appreciate it very much. It is very helpful to us.

Mr. LACOVARA. Thank you, sir.

Mr. MCCLORY. I am concerned about the in camera proceedings that we are going to have, not because I disagree with the precedents to which you have made reference—the tape case and the other types of recognized in camera proceedings that we have—but it seems to me that more recently, especially in the *Gannett* case, we are into a new era. I just don't know that it is going to be possible in the future to maintain the secrecy of in camera proceedings. And, I don't know how we are going to be able to handle that.

The decision of the Department of Justice yesterday or the day before not to prosecute the Progressive magazine and the other sheet up there in Madison, Wis., suggests to me that maybe the time of secrecy of any kind of classified material is gone, and I know there are some Members of the Congress who feel that the Government should have no secrets, and maybe that is where we are going to go.

You made reference to the subject of standards and the importance of developing standards. On the other hand, I wonder if it is not, if there are not different types of standards that must be considered as far as classified information is concerned. I am thinking, for instance, about classification of narrative in contrast to classification of the name of an informant, for instance, and classification of maybe useful information on the one hand, and classification of a source or a technique.

Do you agree that there should be different standards and different authority in the legislation for establishing different levels of standards for classified or secret information?

Mr. LACOVARA. Mr. McClory, if the subcommittee had the time and the inclination, I would consider that a very worthwhile undertaking.

You might recall that at the hearings held before this subcommittee in January of this year, at which I also had the privilege of testifying, the inquiry was a little broader. It dealt not simply with graymail but with the whole question of leaks and the adequacy of the espionage laws today, and among the issues being considered was the definition of "national security information" or classified information. The subcommittee was considering breaking that general concept down into components that would be entitled to less or greater protection.

It seems to me that what *The Progressive Magazine* case illustrates in comparison, for example, with the *Pentagon Papers* case is that there are certain kinds of classified data for which it is hard to conceive of any justification for disclosure to the public or in the course of a legal proceeding, whereas other kinds of classified information may truly be relevant to a trial. I suggested one in my statement. *The Progressive Magazine* case raises another of the same vein. Technical secrets, technical data, it seems to me, rarely if ever will have a legitimate basis for public disclosure in a trial or through some other mechanism like a leak. Contrast that with what you might call narrative information about policy, which the executive may classify for one reason or another, but that kind of information may be legitimately relevant either to a trial or to the ability of the public to make a judgment about national affairs.

It would be a more ambitious enterprise to define in this bill different categories of classified information, some of which would be automatically immune from disclosure and others of which would be sub-

ject to procedures of this sort. Each of the bills simply takes the existing broad concept of classified information and does nothing to change it, and then proposes a set of procedures that would deal with all types of classified information without further distinction.

I think trial judges in practice might make the distinction that we are talking about because they would be hard pressed to find that the technical secrets of constructing a hydrogen bomb could rarely be relevant to the defense in a criminal case, or that the actual targeting sequence for nuclear missiles would actually be relevant to a criminal trial. But the bill doesn't attempt to make that distinction. Perhaps it should. That is another level of drafting and it involves other difficult choices, as we know: what kind of information to call sensitive intelligence information—or however the special category would be designated—and which types of otherwise classified information should simply receive the general protection.

Mr. McCLORY. What annoys me politically is the manner in which material is declassified. It seems to be a prerogative assumed by the executive department and sometimes by Members of the Congress to independently determine what is to be declassified, and we frequently see members of the executive branch announcing or disclosing for the first time in the media, principally on television, material that has been classified until that very instant that the public annoucement is made. The same offense is also committed—I call it an offense—by Members of the Congress from time to time, in my view.

The administration bill would permit the prosecution to utilize classified material in an open court proceeding without any prior declassification.

How do you feel about the provision in the administration bill, and if you want to comment on the other offensive practice, I would enjoy that, too.

Mr. LACOVARA. Mr. McClory, the phenomenon that you described, I think, has been with us since the Republic was established. I have done some work on that subject as well, and you can go back to the time of George Washington and John Adams and find them or in some cases their opponents selectively leaking diplomatic correspondence and what we would today call national security information or state secrets. I don't know how one can legislate against the opportunistic use of secret information. Information or knowledge is power, and people who are in public life are inclined to use it for the interests that they consider best, in the public interest or personal interest. I think that all we can do is hope that public officials exercise some reasonable judgment in deciding when they are going to release otherwise secret information.

The problem of declassification in court is a somewhat different one because the process that we are discussing this morning involves a deliberate weighing by the Attorney General and his subordinates of the interest in going forward with a criminal investigation against the protection of that classified information. There would be some instances in which the classified information, if it would have to be disclosed in order to go forward, would require that the prosecution be aborted. In other cases we are assuming that the interest in getting to the bottom of alleged misconduct may outweigh the significance of that particular piece of classified information.

I regard that as an inevitable choice that has to be made, and as long as the decision to declassify it through its release in a trial, if it has to be released, is made in good faith and with appropriate consultation with intelligence agencies, the decision to release it does not trouble me.

Mr. McCLORY. Just one more question.

You appear to be in opposition to any interlocutory appeals with regard to the issue of utilizing or disclosing of classified material, and apparently believe that the entire appeal should await the outcome of the case.

Mr. LACOVARA. No, I may not have made myself clear in my statement, but I do explain that I support the notion of interlocutory appeals, but I think Congress should require and specify that the appeal be permitted only to the court of appeals, the first tier, without adding on an opportunity for Supreme Court review at the interlocutory stage. That will prevent the delays from getting totally out of hand.

As you know, the certiorari process of the Supreme Court may add months or even years to the process, and if Congress is going to allow interlocutory appeals by the Government, there will be some delay, inevitably. I think that is a worthwhile compromise, but I would say at that stage there should not also be an opportunity for Supreme Court review.

Mr. McCLORY. That worries me in the District of Columbia Circuit, but it wouldn't otherwise.

Mr. LACOVARA. Well, I think that is a tradeoff. I have some experience with the District of Columbia Circuit, and I know it is Russian roulette, Mr. McClory. It depends on which panel you get, and it is quite vivid, and I don't think any lawyer would deny that.

Mr. McCLORY. OK, thank you very much, Mr. Chairman.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Thank you very much, Mr. Chairman, and welcome again, Mr. Lacovara.

As sort of an aside here, I would like to make note that I was reading the morning Washington Post and I noticed that your son was nominated as a national merit semifinalist from his high school, and I think that you as a parent, I am sure, are very proud of that.

Mr. LACOVARA. I am, and thank you, sir.

Mr. MAZZOLI. You mentioned that this bill is a synthesis of techniques and noted that if the courts had some sign of encouragement, some inducement to exercise and use these techniques that they would, and that there would be more of a consistency and there would be more of a pattern rather than this hopscotching around, and, accordingly the cases would be handled in a better way.

I wonder if you might expand on that point. I think that if we take a bill like this, out of this committee and to the floor, it seems to me that we are going to have to explain it to the Members of Congress not as an intricate legal document, though it is that, and not as a series of constitutional cases which have been decided, though we will have to have those available, but what does it really do in the real world of intelligence work and in the real world of courts, and I think that that term "synthesis of techniques" is an interesting way of pulling it to-

gether, and I wonder if you might expand that for just a few moments. I gather you said all of these have some precedents, they have been used by some trial courts in the past, and whether we can emphasize that in selling this bill.

Mr. LACOVARA. I believe you can, Mr. Mazzoli.

When I described the bills as a synthesis of techniques, what I was suggesting is that the problem of balancing Government interests against defense interests is not a novel one; it is not unique to this area. It arises, for example, in the informant area where the Government has an undercover agent, and for some reason the defendant at trial wants to learn the identity of the informant—25 years ago or so the Supreme Court in the *Roviaro* case confronted that problem and said that in some situations the defendant may be entitled to the disclosure of the informant and in others he may not. If the court finds that he should obtain the identity of the informant and the Government nevertheless insists on protecting the identity of the informant, certain sanctions may be imposed, and they should be tailored to the case to make sure that the defendant's interest is being adequately protected.

One of the things that this bill does is to borrow on that experience and to outline for courts that those efforts that the courts developed on their own in a case by case or common law methods have to be applied in this very sensitive and important area of prosecutions that involve national security information. The court has to weigh defense interest against public interest, and has to decide what alternatives will be available to protect the public interest as well as the defense interest.

I think the justification for the bill and its structure can be explained as an attempt by Congress to give the courts guidance on how to resolve a problem that has proved very vexing for them. The cases that are cited in my testimony before the subcommittee back in January, which is attached as appendix A to the statement this morning, describe how, just in the past year, some courts have been willing to use some of these techniques, but other courts have declined to use these techniques in cases that seemed quite comparable.

So the legislation attempts to provide consistency and a systematic approach. I believe that it is an appropriate function of Congress to define the rules of procedure that the courts will follow, and to define them by making what are basically policy judgments about how various competing and legitimate interests should be balanced. Each of these two bills, with appropriate modifications, attempts to do that.

Mr. MAZZOLI. Thank you.

I would like to ask one other question, if I could.

Without pinning you down, could you grade, perhaps, the two or three most important provisions which are put forth with respect to these techniques in the committee bill? In your mind, what are the one or two or three things that you believe, if adopted and put into some statutory law, would provide what is really needed to solve most of these vexing and difficult questions?

Mr. LACOVARA. I think the principal device that would be codified by the subcommittee bill or by the administration bill, for that matter, would be the specification of alternatives that the court is to consider in deciding whether to disclose original classified information to the

defendant or at the trial. That mechanism requires the court to go through a step-by-step process of analysis to decide how best to reconcile the defense interest with the public interest, and I think it is that identification of the choices that must be considered that will be most useful in guiding the courts in handling these cases.

Mr. MAZZOLI. And one final question.

You, I believe, indicated in your testimony that you preferred the Justice Department approach in the situation where the judge is presented with this information, as against the committee bill where there is a triggering in certain occasions by the Attorney General and automatically there is the in-camera hearing.

Would you expand on those points again?

Mr. LACOVARA. Certainly.

The debate on that issue deals with two issues. One is whether or not the Justice Department's ability to present its explanation of the sensitivity of the information will prejudice the judge's ruling on the ultimate decisions he has to make. Those decisions are whether the evidence the defendant is seeking is relevant and whether, if it is relevant, some substitute for the information will be adequate.

The other issue is whether or not in camera proceedings ought to be triggered solely at the request of the Attorney General.

I said that I preferred the Justice Department or administration approach for this reason. I find that first factor, the possible prejudice of the judge, an overstated one. The judge is going to be exposed to information explaining the sensitivity of the information at some point before he makes his ultimate decision. It doesn't seem to me to be more egregious or more likely to affect that judgment that it comes to him at the preliminary or triggering stage.

On the other hand, I think that, for reasons to which Mr. McClory adverted in referring to the *Gannett Newspaper* decision, we still should be somewhat chary about holding in camera proceedings. They ought not to be automatic, even in this field, and for that reason I think it is appropriate to say that, before the judge decides to hold an in camera proceeding on this subject, the Government ought at least to make a preliminary showing that there is a good reason for closing this aspect of the proceeding to the public. And that is why I resolve the balance in the way that the Justice Department does.

Mr. MAZZOLI. Well, I certainly thank you, Mr. Lacovara. It is always a pleasure to hear you.

Mr. LACOVARA. Thank you.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. MURPHY. Counsel?

Mr. O'NEIL. May I follow up Mr. Mazzoli's question?

Mr. MURPHY. Sure.

Mr. O'NEIL. Mr. Lacovara, I think the approach in H.R. 4736 is bifurcated. The first question is the relevance or admissibility of a particular piece of information, document, and any subsequent decisions that the court has to make about substitution or the later use of that information in court is clearly separated from the first determination of relevance or admissibility.

Why do you take the position you do? Certainly you could divorce the issue, for instance, of whether or not to have an automatic in cam-

era proceeding from that issue. It is a question of whether or not something is relevant or admissible under standards that are now existing and which no one suggests that we change.

Mr. LACOVARA. You are correct that those are issues that can be analyzed separately. The Justice Department's single proceeding rather than the bifurcated proceeding strikes me as a more efficient one, and that is one of the reasons why I suggested in my testimony that I prefer the basic structure of the administration bill rather than the subcommittee bill, because it does have that series of decisions made in a continuum rather than in a bifurcated way.

One of the factors the judge is certainly going to consider in weighing whether to make the original information available to the defense or to permit its use at a public trial is the relative delicacy of the information. I think that is an appropriate balance for him to make. In balancing importance or relevance to the defense against the nondisclosure of that information or the use of some substitute, it is appropriate for the judge to be considering just how delicate, sensitive and damaging the classified information would be. Now, ultimately, if he decides, according to one of the tests that we discussed, that it would be unfair to the defense to withhold the information from the defendant, he is not permitted to withhold it regardless of how significant or delicate or sensitive the information is.

But I think that is an appropriate inquiry for him to make, and for that reason I am not troubled by the Justice Department's proposal that it must make a preliminary showing on that subject even to get an in camera hearing.

Is that responsive? Maybe I am not——

Mr. O'NEIL. It is, except I wouldn't—maybe I used the wrong word, the wrong emphasis in using the word "bifurcation." I consider it a continuum if you have a decision on relevance or admissibility, you then move on in the same proceeding to determine whether or not, since the evidence has been determined relevant or admissible, to whether or not a substitution can be made or some sort of deletion or summary can be made. At that point, it is clearly important to know what the sensitivity of the information is. Then you can move on, if the Government still refuses to produce or make that information available to the defendant, to the question of whether or not there is an appropriate remedy that ought to be exercised by the court, and the Government in effect gets an advisory opinion from the court on what that would be. It then can make its decision in the full light of knowledge of what will happen if it provides the information and what will happen if it does not.

But the question of the sensitivity of this information in terms of the national security really doesn't bear, it seems to me, on the first point, which is whether or not under existing standards of relevance or admissibility this information could have been provided the defendant. Then there is a continuum. That is just the first part, the initial determination is divorced from the actual sensitivity of the information, and the certification of the Attorney General of the Unted States is that measure of imporance that you referred to when you said that this ought not to be an automatic in camera proceeding. Presumably it is important enough if the Attorney General will actually sign his name to that piece of paper.

Mr. LACOVARA. Well, everything you have said is an accurate description of the differences in the bills. I am not sure I can go much beyond what I have already said in explaining why I think the Justice Department's procedure is a more efficient one for focusing the court's attention on what is ultimately the issue, and that is whether or not the defendant is entitled to the classified information or some substitute for it. I don't think the differences in pracice are going to be all that serious. Ultimately—it is inevitably a two-step process. Is what he is asking for relevant in general? And is what he is asking for necessary or fairly necessary in its original form, or is some substitute or description of it, or some sanction in return for nondisclosure of it going to protect his interests?

Mr. MURPHY. Mr. Lacovara, we have to go down and meet this vote.

Does counsel have any questions?

Maybe we could submit some questions to you so that you can leave. We don't want to tie you up all day. And again, we appreciate your coming before the committee and helping us.

Mr. LACOVARA. Thank you.

Mr. MURPHY. We will be adjourned and we will be back in about 5 minutes, after we vote.

[A brief recess was taken.]

Mr. MURPHY. The Select Committee on Intelligence, Subcommittee on Legislation will come to order.

Our next witness is Mr. William Greenhalgh, professor of criminal law at Georgetown University Law Center.

Professor Greenhalgh is also the chairman of the American Bar Association's Committee on Criminal Code Revision. Although he does not speak for the ABA today, he brings much thought and study to the subject of graymail legislation.

We welcome you, Professor Greenhalgh.

[The prepared statement of Professor Greenhalgh follows:]

STATEMENT OF PROF. WILLIAM W. GREENHALGH

My name is Professor William W. Greenhalgh of Georgetown University Law Center. I am a former Chief Assistant U.S. Attorney for the District of Columbia. I have been teaching federal criminal trial advocacy at the graduate level (E. Barrett Prettyman Fellowship Program—L.L.M. in Trial Advocacy) since 1963. I also am presently Chairperson of the Criminal Justice Section's Committee on Criminal Code Revision of the American Bar Association, as well as its faculty advisor to the American Criminal Law Review.

I support the concept of H.R. 4736, entitled, "The Classified Information Criminal Trial Procedures Act," familiarly known as the Murphy Bill. The Murphy Bill addresses a serious problem which the Congress should resolve. However, I do not believe that separate legislation is necessary to accomplish this.

I feel that the best way to address the issues is through the oversight capability of the Advisory Committees of the U.S. Judicial Conference relative to the Federal Rules of Criminal Procedure and/or Federal Rules of Evidence. The Supreme Court of the United States then promulgates rule changes, and you, the Congress, may than work your legislative will on proposed amendments. It is my position that this method provides for greater superintendence by involving the academic community, the practicing bar, the federal judiciary and the legislature. There appears to be more flexibility in this approach than to lock into legislative concrete a highly complex, albeit important, technically procedural piece of legisation.

I, therefore, support modest amendments to existing rules and statute. For, if anything has surfaced during the hearings held by the Legislation Subcom-

mittee on August 7, 1979, it was the fact that existing federal rules appear to be adequately meeting the problem. The ITT–Chile case was the only one mentioned where an interlocutory appeal procedure would have been helpful to the Justice Department, and since that remedy was lacking, mandamus was not apposite.

I believe that the objectives of section 101 of the Murphy Bill could be better accomplished by the following action:

(1) Amend present Rule 17.1 of the Federal Rules of Criminal Procedure in cases involving classified information to provide a mandatory pre-trial conference to be ordered by the court on motion of either party.

This will still effectuate the salutary goal of section 101 by insuring that issues involving pre-trial and trial discovery will be handled in such a manner as to "promote a fair and expeditious trial."

(2) Amend either Rule 12 of the Federal Rules of Criminal Procedure (New Rule 12.3) or the appropriate Federal Rule of Evidence to include a new provision that would require mandatory procedure for determination of classified information disclosure either pre-trial or during trial (section 102). This amendment should also include the provision found in section 107 of the Murphy Bill requiring the government to provide the defendant with reciprocal disclosure. This discovery vis-a-vis reciprocity section is extremely important in view of *Wardius* v. *Oregon*, 412, U.S. 470 (1973). I believe that the inclusion of the provision relating to the entitlement of the defendant to be advised of information and witnessses which the government intends to use to rebut particular classified information, as well as the bill of particulars part of section 107, detailing related aspects of the prosecution's case, is essential to the fundamental fairness of this new rule.

(3) Amend Title 18, U.S.C. section 3731 to provide for an interlocutory appeal in classified information cases by the government before or during trial. This amendment should provide also for expeditious determinations of pre-trial appeals. The provisions of section 3731 as to pre-trial release should be closely followed, as well. A simple amendment to section 3731 is all that is necessary.

Although the sponsors of the Murphy Bill, in their wisdom, do not include a Section 10 embodied in both H.R. 4745 (the Administration Bill) and S. 1483 (the Biden Bill) which would create a classified information exception to Title 18, U.S.C. section 3500; commonly and reverently known as the Jencks Act, I do not support in any way any amendment to the Jencks Act whatsoever. The House of Delegates of the American Bar Association at its Midyear Meeting in February, 1979 in Atlanta went on record in opposition to proposed new Rule 26.2 of the Federal Rules of Criminal Procedure, which would provide for reciprocal Jencks Act discovery by the government of defense witness statements. The Drinan Subcommittee of the House Judiciary Committee will hear from the ABA and other witnesses fairly vociferously on this new proposed Rule at a later date.

This is a second attempt by the Justice Department to meddle with a piece of legislation that has worked pretty well in federal criminal courts for some 22 years. It is the only *mandatory* trial discovery permitted the defendant. It is uniformly applicable in all federal criminal courts. It mandates excision only of unrelated matter. It permits the government the option of refusing to produce the witness statements. It also provides a list of sanctions for non-disclosure, which do not necessarily indicate the termination of the prosecution. To create a classified information exception will predictably lead to other proposed exceptions, with the end nowhere in sight.

While it is true that the House of Delegates of the ABA in August 1978 in New York adopted a new Standard 11–2.6(c) of the "Standards Relating to Discovery and Procedure Before Trial," which provides that "disclosure shall not be required when it involves a substantial risk of grave prejudice to national security and where a failure to disclose will not infringe the Constitutional rights of the accused," (emphasis added), I believe proposed section 10 will so intrude. I content that its enactment will severely impinge on the right of the defendant to have the assistance of counsel during the course of a federal criminal trial, as well as seriously restrict counsel's ability to confront the government's accusers.

Statutory procedures that impair the accused's enjoyment of the Sixth Amendment by disabling counsel from full assisting and representing one's client are plainly unconstitutional. Excision of that portion of the witness statement because of consistency in the Administration's Bill and substitution of a summary

when consistent in the Biden Bill, we submit, completely denies access to the accused's attorney of one of the most important criminal trial rights—impeachment. First of all, the lawyer in our adversary system should make the decision whether or not to use the statement, not the court. *Denis* v. *U.S.*, 384 U.S. 874–875 (1966); *Anders* v. *California*, 386 U.S. 738, 744 (1967); *Alderman* v. *U.S.*, 394 U.S. 165, 182–183 (1969). Secondly, only the lawyer knows the value of impeachment. *Jencks* v. *U.S.*, 353 U.S. 657, 667–668 (1957). In an adversary system of criminal justice, there is no right more essential than the right to assistance of counsel. *Lakeside* v. *Oregon*, 435 U.S. 333, 341 (1978). But he must not be denied the means with which to effectuate that right.

My impairment of confrontation argument is equally blunt. You can't cross-examine with a summary. Yet cross-examination is a matter of right. A lawyer may ask a witness concerning identification with the community in light of one's environment. He may surely discredit a witness by demonstrating that the testimony is untrue or biased. All these great constitutional principles were clearly enunciated by the Supreme Court almost 50 years ago in *Alford* v. *U.S.*, 282, U.S. 687, 691–692 (1931).

In summary, excision denies counsel access for purposes of cross-examination, and producing a summary disables counsel from accomplishing cross-examination. In either case, the accused is denied effective assistance of counsel. Section 10 in both the Administration Bill and the Biden Bill cannot pass constitutional muster.

Mr. GREENHALGH. Mr. Chairman, it is a pleasure to be here.

Probably I should have put in in the first paragraph with regard to my experience a couple of items which may lend some credibility to my testimony.

The first 3 years when I started practicing law in the District of Columbia, I was assigned as a staff attorney in the Perjury and Fraud Unit of the Criminal Section of the Internal Security Division of the Department of Justice. Those 3 years were 1955 to 1958. The dates are significant because two matters were boiling in that unit at that time. One was Clinton E. Jencks and the other was Harvey Matusow, who in no small measure contributed to the *Jencks* decision because he was the informant that went sour in the *Jencks* case.

The other aspect is with regard to having taught Federal criminal trial advocacy for the last 17 years at Georgetown. The program I run is a graduate program dealing with graduate fellows who try cases representing indigents at the felony level in the District of Columbia. I have had 87 lawyers work under me, and they have tried, some 2,000 felonies, most of which have been tried in the U.S. District Court for the District of Columbia. So I think I know something about the Jencks Act, and that, of course, as you read in my very brief statement, is with what I am most concerned.

Mr. Chairman, as far as I am concerned, your bill is much better than the other two put together on that. I very much appreciate what you are trying to do. It is just a question whether you need separate legislation. You have heard Mr. Scheininger, you have heard Mr. Tigar, you are hearing me today, I think even Mr. Lacovara to some degree would say do you really need a separate piece of legislation for a very limited purpose with regard to classified information as opposed to maybe amendments to the Federal Rules of Criminal Procedure, or possibly to the 500 series in the Federal Rules of Evidence.

For that reason, I would suggest and recommend a further consideration concerning key amendments as to the first part of our bill which deals with really pretrial determinations before we get to the Jencks Act. I think a lot of this can be remedied even though, let's, for example, say your pretrial conference, under present existing 17.1

contained in the Federal Rules of Criminal Procedure now, is not mandatory. For the most part, I think you heard when you were here August 7 that procedures have been pretty well worked out pretrial with regard to these conferences between defense counsel and the Justice Department at that juncture. If you make them mandatory to require on the national security case, or classified information cases, I think that would obviate any potential gamesmanship at that level.

Next would be your pretrial determination as well as trial determinations as to relevancy and admissibility which I think could be handled by proposed new rule 12.3, assuming—and this is very important, Mr. Chairman—they pay attention to you with regard to reciprocity. Now, I think the Department will back down on that. I think I have heard enough in the streets around Washington, that if you push them hard enough on that, they will, for lack of a better word, cave in on reciprocity, because I think it is only fair, I think it is only fair when you discuss it in terms of *Wardius* v. *Oregon*. I don't care what they say. If that isn't a due process case, look at the title of the case, "v. *Oregon*." It is not in Federal court. It is pure and simple a due process case.

I think you are home on that point, and I congratulate you for holding your ground and making that a much more fair proceeding.

Lastly, I feel that a simple amendment to present title 18 United States Code 3731 with regard to the interlocutory appeal would be much more satisfactory than to write in again a separate provision as such.

I wholeheartedly agree with Mr. Tigar that pretrial release should be mandatory. We all know we don't like to see spies and people who are about to commit treason on the public space. However, the purpose of bail is to make sure he is going to be there for his trial, and in most instances they are, so far as that is concerned. So with that caveat, I would agree with Mr. Tigar who testified before you last month.

Mr. Chairman, the next aspect—and I again congratulate you in your wisdom, along with your sponsors, that you did not put in an amendment to create an exception for classified information with regard to the present 3500, which is commonly known as the Jencks Act. I will try to give you my full feeling on that with regard to the practice as well as the potential unconstitutionality of an inclusion of that exception to 3500.

One thing I think, Mr. Chairman, and I don't know how exactly to do this. I was hoping Mr. McClory was here because I know he sits on the House Judiciary Committee—along with everything else that is going on in this building, it would appear there is some light at the end of the tunnel after 13 years. It is that a new Federal Criminal Code will emerge, possibly at the tail end of this year and maybe the beginning of next year. It is important, therefore, that some coordination be exhibited between what you are doing if the Jencks Act is to be amended, as well as what both Judiciary Committees are doing on both sides of the aisle.

For example, presently in the Drinan draft, which is Senate 1723, the Jencks Act is yet to be included. I assume it will get there eventually because they are going through markup on the subcommittee now before they get it to main Judiciary.

However, on the Senate side, in Kennedy's bill, S. 1722, it is in in its present form. Now, if there are going to be amendments, somebody has got to be looking a little bit down the road as to which is going to affect what to that extent. I only point that out based on unfortunately my having been sentenced to serve as chairperson of the Criminal Code Revision Committee for the last 4 years. However, I am due for an early parole, hopefully pretty soon.

Getting right to the point, I am quite concerned about the Department in two instances. This is the second attempt within a year to vastly affect 3500. Presently pending before the Drinan Subcommittee of the House Judiciary Committee is a proposed new Rule of Criminal Procedure 26.2. 26.2 came back by the way of the Judicial Conference of the United States to the Supreme Court who promulgated it, and in your wisdom, Mr. Chairman, and the House of Representatives, the bill was dropped in, H.R. 4712, asking for a delay of enactment by the Supreme Court until December 1980, until the public, the bar and academia has had an opportunity to express themselves on 26.2.

The reason 26.2 is important is that it is an attempt by the U.S. Department of Justice to include into the Jencks Act reverse Jencks, which would vastly affect the trial of cases as to defense witnesses as opposed to Government witnesses. And I think testimony should be taken long and clear with regard to that. All I point out is this is the second time within a year that amendments are being filed which will vastly affect the operation of title 18 United States Code 3500.

Let's get right to the two exceptions. One is in the Department bill, and the other is in the Biden bill over in the Senate.

Mr. Chairman, the four prerequisites right now to the production of materials under the Jencks Act, simplistically stated, are as follows. The material must be in the possession of the Government. Second, the defense must request production of those documents. No. 3, the material must constitute a statement within the meaning of 3500(e). That's (e)(1), (e)(2), (e)(3)—(e)(1) dealing with either written, signed or adopted or approved by the witness testifying, or (e)(2), substantially verbatim account given to the individual from which the statement is taken, (e)(3) is grand jury. That must be complied with. And No. 4, and this is the one, I think, which causes me the most concern, the statement must relate to the subject matter of the direct examination.

As you well know, there is no requirement that a document be admissible. It is for a tool which counsel, defense counsel, may utilize in rendering effective assistance of counsel with regard to the possibility of that high constitutional right known as cross examination. That is clear.

Mr. Chairman, I don't know if the Department—and I have yet to see these cases cited, either by Professor Heymann—I could be wrong. I don't think they have taken into consideration the ramifications as to the practice after that witness testified. Let's leave excision alone for a minute, let's leave summaries alone for a minute.

First of all, one of the great recurring problems as far as the prosecution is concerned is when the prosecutor interviews the witness prior to trial. If he takes notes, those are producible under the Jencks Act under a recent Supreme Court case known as *Goldberg* v. *United*

States, which you can find at 425 U.S. From a practical viewpoint, in a case as important as this, the prosecutor is probably going to talk to the witnesses before they testify, and he is going to have to, you know, be very mindful as to the production of his notes with regard to those statements as such. I don't see that—now, remember, we are talking about something that is happening before, at that time, but then will be producible subsequent thereto.

Second, if there is anything that is crystal clear and decided by the Supreme Court dealing with the supervisory power over the Jencks Act in Federal district courts, it is the phenomenon known as a *Campbell* type hearing, based on *Campbell I* and *Campbell II*. *Campbell I* was decided in 1961. You may find that at 365 U.S. at page 85. It is a very important decision, Mr. Chairman, with regard to procedures that must be worked out at the trial level where the district court judge plays a very, very important role. These are some of the things that happen. The Government will, for example, say no documents exist. Careful examination, out of the presence of the jury, which is required by *Campbell*, will then find out maybe the document does exist.

OK, then the court must intervene and assist in the exploration as to whether or not those documents exist. They must take an active part as an arbiter, not on either side but as a fact finder, as such.

The next time in a *Campbell* type hearing, does the material constitute a statement? For example, in Palermo, 1959, the Supreme Court decided that summaries—and this is what bothers me to a certain extent on the production of summaries, because the Supreme Court has already decided in *Palermo* v. *United States* in 1959 that summaries are not producible under the Jencks Act. I am not sure of the ramifications of a case that was decided 20 years ago affecting this kind of legislation.

The next thing that might be discussed as far as a *Campbell* type hearing, the statement is not relevant because it doesn't relate. Well, that is something, the court can pretty much decide that. Or the fact is the Government can come forward and say the statement is lost or destroyed. Now, there is no Supreme Court case on that. However, I direct staff's attention to a very important case here in the District of Columbia dealing with lost or destroyed Jencks material, the *United States* v. *Bryant*, 439 Fed 2d 692, D.C. Circuit 1971. What I am trying to say is the ramifications dealing with Supreme Court decisions purely on supervisory power, not in constitutional power, are *Campbell I* and *II*. How is *Campbell* going to fit into the scheme of what they want to do with regard to creating their exception under the Jencks Act. A possible memorandum out of the Department might be helpful as far as this subcommittee's and the committee's consideration is concerned.

I would like then, with that short allusion to the Jencks Act, proceed where I think is the most important, and I am arguing something that was not argued in Jencks itself. I am talking about the assistance of counsel clause in the sixth amendment, and also the right of confrontation through cross-examination.

The Supreme Court, although not entirely appropriate with regard to what I am about to say, has struck down three State statutes and

one court order since 1961 where there was disablement by the statute for counsel at trial, at trial to perform and render effective assistance of counsel. *Ferguson* v. *Georgia*, 1961, the statute woudn't let a lawyer elicit testimony on direct examination. *Brooks* v. *Tennessee* in 1972 failed to let counsel decide who he would put on the stand in order of proof. *Harring* v. *New York*, in 1975, failed to permit counsel to argue in summation to a nonjury case. In *Getters* v. *United States*, it was a judge, a Federal judge who said you can't talk to your client during the overnight recess, and they said that was absolutely prejudicial, per se, and a violation of the assistance of counsel clause.

What I am leading up to, Mr. Chairman, is disablement with regard to blending in the right of a lawyer to render effective assistance of counsel, and especially with confrontation-type situations.

So let's move right on to confrontation. As the Chair knows, there are five theories of impeachment: capacity, competency, prior convictions, bias and prejudice, and most important in what we are dealing here is prior inconsistent statements, which would deal precisely with production of materials under the Jencks Act.

The highest form of impeachment is inconsistency.

Mr. Lacovara said he reads Alderman one way; I read it another. He is reading it a little bit more on the pretrial aspect, and he may be right. But I think he is dead wrong. Part III of Alderman at the trial level; we are talking about the adversary system; we are talking about counsel should make decisions with regard to the production of evidence and not the court. And I think the *Dennis* case, as I have cited, and *Anders* v. *California* all stand for that major proposition.

And Jencks itself really comes down very hard, even though supervisory in its ultimate decision, there is no higher right than the assistance of counsel, and this was reaffirmed in *Lakeside* v. *Oregon* dealing with jury instructions in 1978.

Mr. Chairman, I defy the U.S. Department of Justice to demonstrate to me, for example, in the Biden bill, that after a court decides that a summary must be substituted how in the world competent counsel can cross-examine a summary based on what that witness said. It substantially will vary, what was said by that witness, what was contained in that material. How do you cross-examine a summary? I don't see it.

I mean, I understand what they are trying to do, but I don't see under the confrontation clause, as well as to render effective assistance, a lawyer can use that as a tool if it is to exist.

Mr. MURPHY. Mr. Greenhalgh, you are going to have to excuse me, but you may continue. Mr. McClory is back and he has voted, and you can bring up that point that you brought up before in his absence where you mentioned his name.

Mr. GREENHALGH. OK.

Mr. MURPHY. And I will be right back. I just have to vote.

Mr. GREENHALGH. Sure.

Mr. MCCLORY. Is there a precedent, though, for the use of the summary? That, I think, in the intelligence community, that is a frequent tool that they use and——

Mr. GREENHALGH. How many times, Mr. McClory, is a summary used in a Federal district court trial for purposes of confrontation?

Mr. MCCLORY. Well, I'm not too sure about the trial.

Mr. GREENHALGH. Well, for example, I forgot to tell you as far as my background is concerned, from 1955 to 1958, I was a trial attorney in the Perjury and Fraud Unit of the Criminal Section of the Internal Security Division of the Department of Justice. I am very familiar with summaries. And, of course, two of the cases that were running around there were Clinton E. Jencks and Harvey Matusow.

I agree with you, but again I am talking from a trial point of view with regard to the highest right of confrontation, which is impeachment and is also reflected in the assistance of counsel clause.

I draw your attention to, I think, one of the most important Supreme Court cases ever decided with regard to the confrontation clause—which is on the bottom of page 5 of my statement—in *Alford* v. *United States*, which lays down, I think, important considerations, especially if there are to be excisions where counsel will not know what has been excised, or summaries are to be substituted, that we have no question about cross-examination as a matter of right.

And the other thing: all of a sudden, the Department's attitude is, well, we will give you summaries of everything that is consistent. Mr. McClory, I suggest to you, as a trial attorney, consistency can breed inconsistency because of having looked at the document, and counsel, if that counsel is trained with regard to probing in an exploratory fashion, which is permitted under the *Alford* case, consistency may very well turn to inconsistency and, of course, prior inconsistent statements are the highest form of impeachment. And I strongly—well, to be very frank, you were here, sir, as I recall on August 6, when Congressman Mazzoli asked Professor Heymann I thought, a very good question: "In national security cases, has the Jencks Act been a problem?" And what was Professor Heymann's reply? "Not in any substantial way."

Now, do they really need it based on the exchange between Congressman Mazzoli and the Assistant Attorney General in charge of the Criminal Division? How essential is it? Not in any substantial—maybe that is not exactly it, but the court reporter has it, and you can look it up in the transcript.

Now, you asked also a very interesting question preliminarily dealing with pretrial procedure. If the procedures are adequate, from what everything said people are working these things out under the present, existing Federal Rules of Criminal Procedure and Federal Rules of Evidence, do we have to write something into statutory language?

I can see what, as I say, my proposal along with Scheininger and Tigar are amendments to the Federal Rules of Criminal Procedure and an amendment for an interlocutory appeal in existing governmental appeals under 3731. I buy that, and I think that is important. But I do not see, especially when the answer to Congressman Mazzoli's question by Professor Heymann, and also the fact that there are serious constitutional problems using summaries at trial as well as excising material that counsel will not be able to see. And I think that is wrong. I think it can be argued very heavily that it will interfere with the assistance of counsel clause and certainly will offend, and probably constitutionally impair, the ability to cross-examine through the use of impeachment.

And I think your bill, the subcommittee bill, which does not have that provision in it, should resist any embellishments or temptations

or pressure from the Department or other witnesses. Leave the Jencks Act alone, because it has worked fairly well over the last 22 years.

I will be happy to answer any questions that I can.

Mr. McCLORY. Well, as I understand, you prefer the committee bill, the bill that Mr. Murphy and I introduced.

Mr. GREENHALGH. Prefer, yes, sir. As to its concept, I suggest maybe you don't have to pass a separate piece of legislation; especially with, not your connection, but with your participation in the House Judiciary Committee, I would recommend amendment rules to the Federal Rules of Criminal Procedure in the first two instances, which is dealing with the mandatory pretrial conference, as well as a proposed new rule 12.3 dealing with pretrial and trial determinations relative to admissibility and relevance of evidence as far as the trial judge is concerned, and then a simple amendment to the interlocutory appeal to the present 3731.

Mr. McCLORY. I am concerned about your criticism of the right to excise parts of a classified material. Certainly, we would want to excise the names of informants. We would also want to excise certain other sources and perhaps certain techniques, would we not, because of the risk that even in an in camera proceeding, the risk of leaks would be too great to want to utilize that information.

Mr. GREENHALGH. But if any of the direct testimony were related to anything in that document, it cannot be excised under existing law. If it relates in any consideration to direct testimony, it must be produced. It cannot be excised. That is the thing that bothers me.

Mr. McCLORY. Well, wouldn't the prosecution, then, be, or for that matter, wouldn't the defense be frustrated in as far as utilizing that material either for prosecution or defense purposes?

Mr. GREENHALGH. Well, the prosecution would have to make a command decision, would it not, to put that witness on the stand, knowing full well that if the testimony related, production of the documents must occur.

Mr. McCLORY. Well, maybe the defense wants the——

Mr. GREENHALGH. Well, that is my position, yes, sir.

Mr. McCLORY. I know, but if the defense wants the information and material and can't have it available unless parts are excised, do you feel that he or she should be deprived of the entire document?

Mr. GREENHALGH. All I can say is if it relates it must be produced. Now, how they are going to manage that, I do not know, based on what they are attempting to do here, and under present existing procedures—you see, another thing, Mr. McClory, before you came in, sir, I really, and especially with your expertise on the Judiciary Committee——

Mr. McCLORY. It is very limited.

Mr. GREENHALGH. No, really. One thing I mentioned to Mr. Murphy is, and I haven't seen this case cited in all the documents coming out of the Department. What is the effect of the *Campbell* case, Campbell I and Campbell II, which provides for the court intervention with regard to a hearing out of the presence of the jury, as to all aspects of these documents, as to are they statements, do they relate, and all of that.

Now, somewhere down the line, if this legislation is going to be passed as the Department wants it, the *Campbell* case, which has been

on the books since 1961, is going to be vastly affected concerning district court procedures concerning a Jencks Act hearing, and I really think you should get some sort of an expression out of the Department as to how Campbell is going to fit into all of this with this proposed exception, because it is a very important case as far as the procedures are concerned, it is the law of the land in Jencks-type situations, and it has been decided for 19 years.

Mr. McCLORY. Do you think the situation the way it is now is all right?

Mr. GREENHALGH. Yes, sir. I think the Jencks Act has worked reasonably well for 22 years.

Mr. McCLORY. You feel there is no need for any graymail legislation?

Mr. GREENHALGH. No, sir, I didn't say that.

Mr. McCLORY. No?

Mr. GREENHALGH. Amendments to rules, amendments to a statute, and I think that is important. Tigar, Scheminger, and myself, and I think Mr. Lacovara to a certain extent indicated that to you.

I appreciate what you have done as far as a separate piece of legislation. It is a very—it is a good piece of legislation, but it is a little complicated, Congressman McClory, it is a little complicated, and if you use the good sense of a fair and impartial district court judge, plus a couple of lawyers, the prosecution and the defense, they are probably going to iron this thing out, assuming mandatory consideration with regard to pretrial conference and a new 12.3 along with—may I congratulate you on the reciprocity provisions in the Murphy bill. I think that is terribly important under Wardius.

Mr. McCLORY. Are you saying that the subject could be handled by amendment of the Rules of Criminal Procedure?

Mr. GREENHALGH. Yes, sir.

Mr. McCLORY. Without the need for any legislation.

Mr. GREENHALGH. I join Mr. Schininger and Mr. Tigar, and I know something about the Federal Rules. I have lectured extensively on it, in fact, very amusingly, to the Attorney General's Advocacy Institute—I am the only lay person allowed in there. I don't know why. But I know something about it. And I think it could be handled in a simple way on that.

Mr. McCLORY. How do you feel about degrees of classification?

Do you think that there should be different levels of classified material, different standards?

Mr. GREENHALGH. I heard you when you asked that question and I was of course deeply troubled that you would ask me the same question.

It could present a problem as to an amendment on new 12.3 as to subsections as to degree of classification. I honestly—I can't give you off the top of my head on that. I think that is something maybe the staff could play with with regard to different gradings as to what action should be taken as such. I just can't give you a feel for that.

You could probably do it better in your bill, there is no question about it, but doing it on amendments to the Federal Rules, that may become a problem. However, I think it is worth looking at.

Mr. McCLORY. I don't know whether you covered the subject of interlocutory appeals or not, but do you feel that there should be a right to an interlocutory appeal with regard to a decision regarding classified material?

Mr. GREENHALGH. Absolutely, absolutely. I say that in my statement——

Mr. MCCLORY. And it should go all the way to the Supreme Court?

Mr. GREENHALGH. No, I'm—our problem is delay. You have got a jury trial, let's say, and something pops up and the prosecution doesn't like it and they want to go to the fifth floor—let's say it is the U.S. court over here at third and Constitution—they want to go to the fifth floor, it might take a few weeks to get a decision, and then if there is anything more, up to the Supreme Court, it might even take longer. Well, you have got jurors sitting around. We are not even talking about wasted resources as to how much money. We are talking about recollection as to what has transpired and all that. It should be an expedited appeal. I think Mr. Tigar was 100 percent on it, move it up as fast as you can and get a decision as quick as you can. But that, Mr. McClory, can be I think a very simple amendment into 3731, which is the Government's right to appeal now. Just drop a subsection on that.

Mr. MCCLORY. What about reserving, then—if the Government doesn't like the decision, should the right be preserved, then, to dismiss the case?

Mr. GREENHALGH. Oh, sure, but don't they have that as an inherent right? Isn't that what happened in Mr. Scheininger's case, in ITT-Chile?

Mr. MCCLORY. I don't think we are altering that.

I am trying to think whether the converse could arise.

Mr. GREENHALGH. Mr. Tigar wanted a defense appeal. Probably I should be in favor of that, but I am not because then I have appellate review, assuming a conviction, the whole big ball of wax would be up there. I don't see any reason to delay it. The Government, yes, under those circumstances, but not defense because of ultimate appellate review, assuming a conviction.

Mr. MCCLORY. Fine.

Well, thank you.

Mr. MURPHY. Does counsel have any questions?

Mr. O'NEIL. Mr. Greenhalgh, would you comment on the point that Mr. Lacovara was making earlier about when some indication of the importance of the classified information is provided to the court. You know, he supports the approach in 4745, where you provide it immediately to the court when an in camera hearing is requested, whereas the subcommittee bill would provide that information to the court only after a decision of relevance and admissibility has been made.

Mr. GREENHALGH. I prefer your bill, the Murphy bill, to that extent because again I would still like to go on amendment to the Federal Rules of Criminal Procedure where I think that could be worked out, you know, the good sense as well as the fairness and the impartiality of the Federal judge of doing all that. If you are going to go—if you ask me how you are going to go, I would say the Murphy approach.

Mr. O'NEIL. What about the suggestion inherent in 4745, the administration proposal for a higher standard of admissibility when you are talking about classified information?

Mr. GREENHALGH. Where did they get this from, Roviaro? What does Roviaro have to do with trial? Nothing to do with admissibility of evidence. It is whether or not an informant's identity can be produced under a bill of particulars under the Federal Rules of Criminal Proce-

dure. It is ingenious but it is incorrect. It has nothing to do with admissibility of evidence.

Mr. Tigar, I think, as I recall—I was sitting in the back of the bus on August 6, and I thought he came down very hard on that same point.

Mr. O'NEIL. There are three provisions in the administration bill, sections 8 (a), (b), and (c) which would amend current rules of evidence; 8(a) would authorize the Government to introduce classified information into evidence without declassifying it. Presumably that information or evidence could be sealed and not be made available to the public. Sections 8 (b) and (c) would amend respectively the rule of completeness and the best evidence rule.

Could you comment on those three proposals?

Mr. GREENHALGH. I am not sure of all the ramifications of 8(a). Would the jury be able to look at that?

Mr. O'NEIL. The jury would; yes.

Mr. GREENHALGH. But no one else?

Mr. O'NEIL. Presumably.

Mr. GREENHALGH. Well, we have all sorts of Gannett problems we are developing as far as the trial courts, and if you read Gannett correctly, of course, the Supreme Court itself was arguing over whether it applies either pretrial or trial. Let's talk about 8 (b) and (c). That's outrageous. It vastly will affect the Federal Rules of Evidence as to the rule of completeness as well as the best evidence is concerned.

And again, Mr. Murphy, this gets back to my first argument about disablement of counsel to perform his or her function in rendering assistance of counsel. And I understand the great concern of this subcommittee and in the halls of Congress, but I think we, you know, out there also is a thing called the Constitution and I think we have got to pay attention to it.

Anything else, Mr. O'Neil?

Mr. O'NEIL. No, sir.

Mr. GOLDMAN. You mentioned the need for reciprocity, how important it is.

What do you feel are the basic concepts underlying reciprocity? Why is it important?

Mr. GREENHALGH. Oh, I think fundamental fairness with regard to requiring the production of information at the request of the Government, that the defense ought to have some sort of equal opportunity to require that from the Justice Department. I think it goes basically just to fundamental fairness. And I think in terms of talking about these very complicated, very difficult and very serious cases under which you have consideration here, it is even more so, probably to a higher degree, to be as fair as possible.

Mr. GOLDMAN. The committee bill provides for reciprocity, not only of information which would be used in rebuttal, but also the names of the witnesses used to bring in that information.

Mr. GREENHALGH. The bill of particulars; right.

Mr. GOLDMAN. Is that second point. the names of witnesses, is that in your opinion required to make a true reciprocity?

Mr. GREENHALGH. Yes: if you believe in which rule of the Federal Rules of Criminal Procedure as far as alibi is concerned, under 12.1.

You do that precisely under 12.1. I see no reason why you couldn't do it under a new proposed 12.3, to be very analogous to 12.1.

Mr. GOLDMAN. Well, the whole concept of fairness you mentioned before would be met by the "reverse Jencks" proposal that the Justice Department is looking for. Why is that unfair?

Mr. GREENHALGH. Well, if you want a half hour on why I think proposed 26.2 is unfair, which is not related to this proceeding, I think—well, first of all, life is very difficult on the defense side anyway with regard to preparation, that is, interviewing, fact investigation, getting your witnesses and so forth and so on, and it is even more difficult with regard to the interviewing process concerning getting those statements. Many times the interviewers are not as experienced as he Federal Bureau of Investigation, Secret Service, U.S. Postal Inspector, the DEA agents, as far as taking those statements are concerned.

Second, there are many items in there which lead to other items which could involve criminality of other people as well as further criminality of your client.

Now, production of those statements, who are you going to have looking at that? The so-called fair and impartial U.S. district court judge who will then see for the first time other implications, and counsel again is going to have a very serious problem because maybe he will join the fray under those circumstances, but a lot of us—when Father Drinan holds hearings on that sometime in the future, we will be up to testify long and clear on 26.2.

Mr. GOLDMAN. You mentioned in your statement that last year the ABA took a position with regard to Jencks. The position was that disclosure should not be required when it involves a substantial risk of great prejudice to national security and where a failure to disclose will not infringe the constitutional rights of the accused.

If that language were included verbatim in the committee bill, thereby meeting at least the organizational concerns of the ABA, what would you feel as to its effect?

Mr. GREENHALGH. This is only as to pretrial; right?

Mr. GOLDMAN. This would only be as to pretrial but I wasn't sure from the way you brought it in your statement.

Mr. GREENHALGH. Well, that is true. As to pretrial, I think that is a sound standard. As to trial, I have very serious doubts, very serious doubts based on my arguments as to assistance of counsel clause and confrontation. What I am talking about then is the amendments to the Jencks Act, which is not contained in your bill, thank God.

Mr. GOLDMAN. Finally, you think these changes ought to be in the Federal rules. The Jencks Act itself is part of title 18. The Congress in setting up the Rules Enabling Act set up another mechanism rather than statutory enactment. If the Congress wants to work its will on a particular item, such as the rape evidence rule, do you feel that it is necessary to go through the other processes? Shouldn't Congress be able to take over a function that it has delegated to another body and do the job itself, and also keep within its own area any responsibility for review?

Mr. GREENHALGH. And precisely at this time, for what has happened, you all had the wisdom to introduce through Father Drinan H.R. 4712

which is in effect a continuation of the effective date of the new proposed rules of Federal criminal procedure. At this present time, within the bosom of this building in both Houses, you have jurisdiction pending concerning proposed new rules, for example, such as 11(e), proposed 26.2, and another one which is going to very controversial, 44(c) dealing with multiple representation.

At the same time, it seems to me with Mr. McClory's influence with regard to judiciary, that could be considered to package this all at one time, especially since you have 15 months' time within which to decide as to the proposed rules themselves.

Mr. GOLDMAN. But in those instances, those are rules that are being proposed through——

Mr. GREENHALGH. The Judicial Conference to the Supreme Court to the U.S. Congress.

Mr. GOLDMAN. But if the Congress wants to enact direct legislation——

Mr. GREENHALGH. Absolutely.

Mr. GOLDMAN [continuing]. In an area——

Mr. GREENHALGH. Do it, assuming, you know, it is good legislation.

Mr. GOLDMAN. But do you agree that Congress can keep it within its own jurisdiction to review; that the Congress ought to be able to put a proposal out for review by those outside organizations.

Mr. GREENHALGH. Well, you have given the public, the bar, academia an opportunity, through the legislative process, to be heard, albeit it is a little fast, but anyway an opportunity to be heard, and I think if the testimony is there and you are satisfied there have been full and fair hearings on this, I see no reason why you have to go all the way back and start the process again because things are popping up that—you see, these people had three, maybe four witnesses testify, Federal rules of procedure, Federal rules of evidence, maybe an amendment to 3731, and it seems to me that would be satisfactory. You might want to get the Judicial Conference, get Remington's committee, the Advisory Committee to the Judicial Conference, and Federal rules of criminal procedure to comment on that, that might be helpful to that extent.

Mr. GOLDMAN. Thank you, Mr. Chairman.

Mr. MCCLORY. May I ask this additional question?

Mr. MURPHY. Sure.

Mr. MCCLORY. You mentioned Father Drinan and the Federal Rules of Criminal Procedure. He also has pending before him a proposed new Federal Criminal Code, and one of the questions that arises right now with us is whether or not such a proposed graymail legislation should be recommended for inclusion in the new Federal Code or whether we should act on this independently.

Do you want to express yourself on that?

Mr. GREENHALGH. Well, I wear two hats. I testified representing the American Bar Association before Father Drinan last Tuesday for 1½ hours, and it was, for lack of a better word, Congressman, it was fun, because all eight people, we had a good exchange. All eight people showed up which is much more than happened in the Senate on Thursday before Senator Kennedy. It seems like there is a great deal more interest with regard to the House of Representatives.

I cannot represent to you ABA-wise. Personally I think it could be controversial, and our position is please keep controversial things out so we can get this doggone thing through after 13 years.

Mr. McCLORY. I think that is an admirable position.

Mr. GREENHALGH. And I can say this personally today as a law professor and not as ABA, quote, Mr. Transcript Reporter, "not as ABA, your bill is better than the Senate version."

Mr. McCLORY. On an unrelated subject, and this might be a question out of order, I have been interested in revising the criminal penalty provisions of the Federal Criminal Code. I have introduced independent legislation, similar to that of Senator Kennedy, to establish a commission for making recommendations for standard penalties for comparable offenses. I do feel that that ought to go into——

Mr. GREENHALGH. Are we talking about the Sentencing Committee?

Mr. McCLORY. Yes.

Mr. GREENHALGH. Yes, sir; our position at the ABA tracks the House version. We would rather see a group appointed by the Judicial Conference of the United States as opposed to that other kind of action over there, yes, very much so, yes, sir, only that the guidelines should be advisory until we know, we gather our empirical data until we know what we are doing, and than you may lock them into legislative, but let's don't lock them first into legislative concrete.

Mr. McCLORY. But to handle that independently would be kind of inconsistent.

Mr. GREENHALGH. It would be a mistake.

Mr. McCLORY. We should work to bring conformity and order.

Mr. GREENHALGH. Right. It is a very—the sentencing provision—you see, you are recodifying, this Congress is historic to that extent, the first time in 200 years Federal criminal law, and let's do it comprehensively as best we can. And I think the sentencing committee or its concept or whatever the entity, is a terribly essential part and it should remain in.

Mr. McCLORY. Thank you very much.

Mr. GREENHALGH. My pleasure.

Mr. MURPHY. Thank you, Mr. Greenhalgh. We appreciate your testimony. It was most enlightening, and I'm sorry for the couple of interruptions.

Mr. GREENHALGH. Well, that's all right. Thank you, sir.

Mr. MURPHY. Thank you.

Our next and last witness this morning is Mr. Otto Obermaier, a member of the New York law firm of Obermaier, Marvillo, Abramowitz & Fitzpatrick. Mr. Obermaier appears before us today to represent the Association of the Bar of the City of New York. We appreciate your traveling to Washington today, Mr. Obermaier, and we welcome you.

[The prepared statement of Mr. Obermaier follows:]

PREPARED STATEMENT OF OTTO G. OBERMAIER

Mr. Chairman and Members of the Subcommittee on Legislation of the Permanent Select Committee on Intelligence: I am gratified to be here today, at the subcommittee's invitation, to present the views of the Committee on Federal Legislation of the Association of the Bar of the City of New York concerning H.R. 4736 ("Classified Information Criminal Trial Procedures Act") and H.R.

4745 ("Classified Information Procedures Act"). Within the Association of the Bar, the Committee on Federal Legislation is charged with responsibility for developing and presenting the views of The Association on proposed federal legislation of a diverse nature. It is for the purpose of presenting the Association's position on the two bills before this Subcommittee that I appear here today.

The concept of establishing a special procedure for a particular type of criminal case or one involving a particular type of subject matter is dangerous. The criminal process attempts to establish a balance (precarious in the view of some) between the accused and the prosecutor. Altering one aspect of the system may have an impact, sometimes unintended and unexpected, on other parts of the system. The dangers are multiplied when the specialized subject matter is national security with its concomitant focus on secrecy. Criminal trials involving ex parte proceedings, appeals during the course of the trial, substitutions for the actual words of documents, special rules for dealing with classified information are all procedural innovations with which we have limited experience.

Our Committee is by no means convinced that prosecutions involving classified information call for a radical alteration (or even any alteration) of the criminal process. We would have ordinarily preferred leaving the matter to be dealt with by the Federal Rules of Criminal Procedure and the sound discretion of district court judges. And this remains our preference.

However, we recognize the substantial feeling in Congress and the Department of Justice that the problem requires specialized legislation.

If there is to be legislation, we do not oppose legislation establishing mandatory pretrial proceedings (so long as the duties placed on the defense and prosecution do not upset the delicate balance of the criminal process as a whole) interlocutory appellate review, and uniform procedures safeguarding classified information by the courts and the parties. And with the reservations expressed hereinafter, we do not oppose mandatory notice by the defendant of his or her intention to disclose classified information during the course of, and in connection with the proceedings. Of the two bills before this subcommittee, we prefer the approach of H.R. 4736. In our view it establishes a fairer balance between the competing interests of the accused and national security in the context of the criminal process.

Our major concerns are the following:

First, our Committee opposes the provision in Section 10 of H.R. 4745 which would amend the Jencks Act, 18 U.S.C. § 3500 in a particular way with respect to classified information. H.R. 4736 contains no similar provision. While the Senate bill, S. 1482, contains a similar provision, one of the sponsors, Senator Biden, has stated that he is not inclined to favor the provision but has left the provision in the bill for the purpose of prompting discussion during hearings. (Cong. Rec. July 11, 1979, daily edition S. 9184). The proposed provision would substantially impair the Jencks Act for national security cases. In the view of many, the Jencks Act as presently existing, is already far too restrictive by mandating disclosures only after the witness testified. To compound the already existing inherent difficulties by allowing deletions or substitutions in place of the actual words of the witness seems unwarranted.

Moreover, experience has shown that it is not the judiciary's role to determine whether a particular prior statement of the witness is inconsistent with the witness' testimony. *Dennis* v. *United States*, 384 U.S. 855, 874–75 (1966). There should be a substantial reluctance to depart from the process of leaving to the trial judge, applying rules of evidence, the decision whether prior statements of the witness contained in the Jencks material should be part of the evidentiary proof.

Second, we oppose the provisions in Section 202 of H.R. 4736 which would require detailed reports to particular committees of the Congress when prosecution is declined "because there is a possibility that classified information will be revealed." We are unaware of a similar reporting in any other criminal context. The decision to prosecute remains the decision of the Executive. Nor are we convinced that there exists a problem of sufficient dimension to require the new procedure proposed. In the instances (rare, we hope) where Congress or its committee believes "oversight" of the prosecutorial declination is necessary, it can attempt to obtain the information informally from the Department. And failing that, Congress could ask a court to release grand jury proceedings to it. The grand jury is an arm of the court; the prosecutor is merely its legal adviser. Such a request would allow the courts to take into account the interest

of any purported accused not to have publicly revealed that he or she was under potential criminal indictment.

Third, consistent with our concern that the criminal process not be further tipped in favor of the prosecution, we urge that the disclosure obligation placed on a defendant be accompanied by a requirement for reciprocal disclosure by the prosecution. As the Supreme Court said in *Wardius* v. *Oregon*, 412 U.S. 470, 473 (1973): "* * * the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum possible amount of information."

Section 107 of H.R. 4736 provides that whenever a defendant is required to disclose particular aspects of his defense, he is entitled to have the prosecution detail related aspects of the prosecution's case. If the court sustains the defendant's right to use classified information, the defendant is entitled to be advised of the prosecution's rebuttal to the information. H.R. 4745 provides no reciprocity provision whatsoever although Sections 5 and 6 require disclosure by a defendant concerning his or her intended use of classified information.

Fourth, we applaud the requirement in Section 201 that criteria be established for initiating prosecution. The establishment of such criteria will have two benefits. First, they will limit the presently unbridled discretion of the prosecution; and second, they will result in greater notice to potential defendants. The establishment of such standards has been suggested by Professor Kenneth Culp Davis in his book, "Discretionary Justice" (1969) at page 225. The guidelines which are promulgated should be publicly available, as, for example, by being published in the Federal Register and the legislation should so provide.

On the whole, of the two bills before the subcommittee, we favor H.R. 4736.

We make the following suggestions for improving H.R. 4736:

We favor the definition of classified information contained in section 2 of H.R. 4745. The major difference bewteen the two bills is that H.R. 4745 does not contain the phrase "or information denied therefrom" now contained in Section 113 of H.R. 4736, which in our view is both unnecessary and substantially vague.

We also believe that the definition of classified information should be contained in the first few sections of the Act.

With respect to Section 107(c), we think the words "bill of particulars" are unnecessary and more limiting than desirable. The law that has arisen surrounding Rule 7(f), Fed. R. Crim. P. allows a bill of particulars to be very limited. There are many ways that the information can be conveyed other than by a bill of particulars. We would also urge the elimination of the requirement that the defendant be required to request such information.

On behalf of the Committee on Federal Legislation, I am deeply grateful to the Subcommittee for permitting me to express these views.

STATEMENT OF OTTO OBERMAIER, ESQ., OBERMAIER, MARVLLO, ABRAMOWITZ & FITZPATRICK, REPRESENTING THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. OBERMAIER. Thank you, Mr. Chairman. It is always a delight to come to Washington, particularly on a gorgeous day like today, and particularly to assist in the legislative process.

The association of the bar, particularly the Committee on Federal Legislation, represents a cross section of the practicing bar in the city of New York, and I am here as the spokesman of the Committee on Federal Legislation to give the committee our thoughts, somewhat rushed over the summer months, on the two bills pending before the committee, one referred to as the administration bill, H.R. 4745, and the other the committee bill, H.R. 4736.

I have prepared a statement which I have circulated and given to the staff of this committee, and which I would like to have included in the hearing record. I would like to take just a few minutes, to summarize it and perhaps to conceptualize some of the ideas contained in it.

The Committee on Federal Legislation is not at all convinced that separate and specific legislation is required to deal with this problem. There is a strong feeling in this committee and the Department of Justice that legislation is required. If there is to be legislation, we would favor this committee's bill, H.R. 4736.

Mr. McCLORY. Is there pending before the Judicial Conference a recommendation for amendments to the Federal Criminal Rules which would obviate the need for this kind of legislation?

Mr. OBERMAIER. That I don't know. I don't have any input as to whether—to my knowledge there have not been published for comments to the bar. Any proposed amendments to the Federal Rules of Criminal Procedure which would deal with this problem.

Normally they are promulgated for comments to the bar if they are made by the Judicial Conference or by one of the Advisory Committees.

Mr. McCLORY. But you are convinced that by amending the Federal Rules of Criminal Procedure we could accomplish the same thing and we wouldn't need this legislation.

Mr. OBERMAIER. Well, I think it is possible to do that, as Professor Greenhalgh has testified here, and possibly an amendment to one of the sections contained in title 18.

I think where the committee that I speak for comes out is basically that we ought to leave this matter to the discretion of the District Court judges and the wisdom of the prosecutors and the defense bar to work the problems out. But short of that— and I think there is a strong feeling that something ought to be done—I don't know if we necessarily come strongly in behalf of amending the rules as opposed to enacting this committee's bill. I don't know where we come out there.

We are troubled—let me just shift a little bit to the conceptual problems—we are troubled by the procedural innovations that would be created under I suppose either one of the bills before the committee, and maybe the amendments to the rules and the statute.

Interlocutory appeals, ex parte proceedings, the substitution of something else for the original words of the document are all concepts that are not totally familiar to the criminal process and some might even say alien to it. Those are problem areas. It doesn't mean something shouldn't be done.

I think what we say is we alert the committee to the fact that we haven't had an awful lot of experience with some of these items. From a criminal practitioner's point of view, ex parte proceedings scare the dickens out of you because as a defense lawyer, you are hardly ever party to them when the prosecutor has them with the court.

An interlocutory appeal, once the jury has been sworn, is a concept that I have no personal experience with. I don't think any members of the New York Bar do. I understand that there is a provision in the D.C. Code that permits interlocutory appeals once the jury has been sworn, that is, appeals during the course of the trial, and I don't know how that has worked out. It is not something—I guess the finality rule in the Federal courts has been around roughly since the Judiciary Act of 1789, and I suppose we should always learn from our past experiences, and maybe this is a good innovation. I would suspect it would cause tremendous problems. But I don't have any experience,

and I don't think our committee can speak to the question of what its practical impact would be.

All we say, and we alert the committee, I think, to the idea that the need for specialized legislation always seems to arise with respect to any criminal trial that is currently in vogue. I mean, there is no reason why we shouldn't have specialized legislation, I suppose, for narcotics trials. This committee believes specialized legislation is necessary for classified information and national security cases. I don't know whether that is always good, and I think that is basically where the committee comes out.

Let me focus just briefly on the legislation itself. We applaud the committee for its inclusion in the bill of a provision that requires the Department of Justice to specify the factors and guidelines necessary to be considered in arriving at a decision to prosecute or not to prosecute. The unbridled and unregulated discretion of the prosecutor is a factor that has been focused on by some people—I think in my prepared statement I quote Professor Davis in his book "Discretionary Justice" where he says that this is clearly a feature which should be required of the criminal process as a whole.

We do not believe that the committee's oversight provisions which would require mandatory review of every decision not to prosecute, as the committee bill requires are desirable. We think this is unprecedented and I am not sure is necessary in order to provide the committee with some idea as to what is going on in the enforcement of our criminal laws. So I think we basically say that we are not sure that that ought to be included and probably oppose that.

We believe the committee's provisions on the reciprocity of the information required to be disclosed during one of these prosecutions is good. We oppose the amendment of the Jencks act which is contained in the administration's bill for reasons that are not all that different from those of the other people who have spoken here with respect to that.

On the more mundane items, I think we believe that the definition of classified information in the administration bill is somewhat better. We believe, in section 107 of this committee's bill that there would be no reason to tie the disclosure required by the prosecution to a bill of particulars, language which has its origin in rule 7(c) of the Federal Criminal Rules but which as a matter of practice is quite limited in what may be contained in them. We believe that there are many other ways to provide the information, and there would be no reason to limit the disclosure to that type of document.

Again, I want to thank the subcommittee for the opportunity of allowing us to come down and contribute to the legislative process by hearing our comments on the two bills pending before the committee.

Mr. McCLORY. You stated earlier, as I understood it, that perhaps it might be better to leave the situation the way it is and let the trial courts make their determinations and handle these, I assume, on a case by case basis. But of course the reason we have this before us is because of the sort of public criticism we have heard. Prosecutions have not been brought and some cases have been dismissed because defendants have claimed that the only way they could get a fair trial was to make public classified information. The Government then, being fearful of

that, had seen fit either to not prosecute it or to dismiss. That is an unsatisfactory position for the law at the present time, and that is the reason for the interest in this type of legislation.

Now, I am very interested in the proposition that this might all be handled by amendment of the Federal Rules of Criminal Procedure, but I don't know whether that would satisfactorily answer what we regard as an existing deficiency in the laws.

I assume that, especially with regard to the measure that was introduced by Mr. Murphy and me, except with regard to some details, you wouldn't have strong objection to that legislation.

Mr. OBERMAIER. No, sir, we would not have strong objection.

Mr. MCCLORY. And that would provide an answer in the absence of fulfilling the need through amendments to the Federal Rules of Criminal Procedure.

Mr. OBERMAIER. Yes, sir, except let me just add one thing. The legislation, as I understand it, would simply add additional procedural requirements before the ultimate decision would be made as to whether to prosecute, in the first instance, or whether a case would be dismissed in the second instance. The question you posed to me, or at least the statement that you made to me about the need for the legislation was that some defendants have said their right to defend themselves requires the disclosure of public information, and some prosecutions have not been brought. That question, taken as a whole, would still be answered the same way, even with the legislation. Namely, if the ultimate conclusion were that a man could not defend himself properly without disclosing this information, the same decision would still be made: namely, either the Department would continue to prosecute or the prosecution would be dismissed. The additional procedural innovations that this legislation requires simply make sure that more people participate in that process before the decision is made, but the decision remains ultimmately the same one.

There are proposed procedural innovations, interlocutory appeals, maybe four judges will now consider the admissibility of testimony as opposed to a single one.

So I think all I am trying to focus on is the ultimate societal decision will always be the same, may not be made the same, but it always will be the same, even with this legislation. And the legislation simply wants to make sure, as I understand it, that other people participate aside from a single District Court judge, and under some provisions, other people other than the Department of Justice, namely this committee.

I kind of used your question as a springboard——

Mr. MCCLORY. Well, as I understand it, there is not an existing mechanism for exhibiting classified material in camera with the opportunity for the judge to determine whether or not the evidence is relevant and admissible in connection with the prosecution or defense. So our bill would provide the mechanism for making this determination.

There are no more parties involved, but the involvement of the existing parties in the process is being changed.

Does that seem correct?

Mr. OBERMAIER. I think that's correct. The procedures which I view as inherent in the court to deal with the problem are now made explicit by either one of these bills or amendments to the rules.

You know, we have had substantial prosecutions involving classified material prior to this legislation. There have been treason trials in New York and——

Mr. MCCLORY. I would be interested in this, if you feel that the need could be filled by amendments to the Rules, that someone prepare and introduce the proposed changes in the rules that we might consider. I suppose we could contact the chief justice and the judicial conference and make such a suggestion to them.

I am not too interested in cluttering up the statute books with procedural material which might better be handled by a rule of court.

Mr. OBERMAIER. I will certainly go back to the Committee on Federal Legislation and see what position they reach and notify the committee, this subcommittee as to what they arrive at.

Mr. MCCLORY. Thank you.

Mr. MURPHY. Questions by counsel?

Mr. O'NEIL. Mr. Obermaier, you have heard the discussion by both Mr. Lacovara and Professor Greenhalgh concerning the appropriateness of providing statements having to do with the sensitivity of the classified information at a particular point in the process at which the court makes a series of decisions. And you have also heard Professor Greenhalgh address the issue of whether there ought to be a higher standard of classified information when it is sought to be introduced or used by a defendant.

Would you address those two issues?

Mr. OBERMAIER. Well, if I understand the first issue, the question is when is the District Court judge informed of the security classification with respect to the material.

Mr. O'NEIL. And the fulsomeness of why it is so sensitive.

Mr. OBERMAIER. I would probably come out on the side of Mr. Lacovara on that issue, namely, we must have confidence in the ability of our District Court judges. Whether we tell him this is top secret or secret at the commencement or at the end, in my view, is not something that should necessarily affect the decision of men who are District judges.

Could you pose the second inquiry again?

Mr. O'NEIL. The Administration has suggested that there be a higher standard of admissibility——

Mr. OBERMAIER. Oh, yes.

Mr. O'NEIL [continuing.] For classified information. Essentially they equate it with the Roviaro standard.

Mr. OBERMAIER. I think I would probably come out on Professor Greenhalgh's side on that controversy. There should be no difference in any way with respect to the type of classification of the information.

Mr. MURPHY. Thank you, Mr. Obermaier. I appreciate your coming down from New York today, and the committee, on behalf of Mr. McClory and myself and Chairman Boland, who had to be away today, thank you very, very much. We appreciate it.

Mr. OBERMAIER. Thank you, very, very much.

Mr. MURPHY. The committee will stand in recess until 1 o'clock this afternoon.

[Whereupon, at 11:37 o'clock a.m., the subcommittee recessed, to reconvene at 1 o'clock p.m. the same day.]

AFTERNOON SESSION

Mr. MURPHY. The afternoon session of the Subcommittee on Legislation of the Permanent Select Committee on Intelligence will come to order.

Our first witness this afternoon is no stranger to this committee, Mr. Daniel Silver, general counsel of the Central Intelligence Agency.

When you last appeared before us, Mr. Silver, you were general counsel of the National Security Agency. The NSA's loss has been the CIA's gain.

Mr. SILVER. Thank you, sir.

Mr. MURPHY. Congratulations on your new position, and welcome to the committee again.

STATEMENT OF DANIEL SILVER, ESQ., GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Mr. SILVER. Mr. Chairman and members of the committee, I am grateful for the opportunity to testify on behalf of the Director of Central Intelligence and the Central Intelligence Agency concerning proposed legislation to establish certain pretrial and trial procedures for the use of classified information in connection with criminal cases, the so-called graymail legislation. My remarks today will be keyed primarily to the provisions of H.R. 4745, the proposal submitted on behalf of the administration. I wish to make it clear at the outset, however, that in my view the differences among the two House bills and the Senate bill, S. 1482, are of much less importance than the common features of the proposed legislation. Enactment of any one of these measures would be a significant improvement of the situation that exists today.

The problems posed by criminal cases in which classified information is involved are a constant and, I believe, a growing area of concern for the intelligence community. You have heard testimony from Assistant Attorney General Philip Heymann and from representatives of the criminal defense bar and civil liberties groups. They represent the concerns of those who deal with such cases in the courtroom. I would like to bring you the perspective of the intelligence community, whose primary responsibility in these cases is to protect classified intelligence information from disclosure. Typically, the intelligence community involvement in such cases is behind the scenes. Because it is out of the public view, the intelligence community role is often misunderstood and invested with a supposed omnipotence that is far from real. My own experience with this class of case has been gained both as General Counsel of the National Security Agency and in my present position. My predecessor as General Counsel of the Central Intelligence Agency, Mr. Anthony Lapham, will also testify this afternoon. The committee is fortunate to have the benefit of his insights, derived from extensive experience with the practical problems posed by this kind of criminal case.

It is evident, at least it was evident before this morning's testimony, that the idea of graymail legislation, and the broad lines of the bills that have been introduced, command rather wide support throughout the Government, the private bar, and civil liberties groups. This fortunate phenomenon stems at least in part from different perceptions as to what kind of criminal prosecution will be facilitated by the legislation. There are some who feel that improved procedures in criminal cases involving classified information will make it easier to prosecute intelligence agency employees and other Government officials. From my vantage point, I think there are far fewer legitimate prosecutions that could be based on past intelligence agency conduct than the more vociferous critics of the intelligence community profess to believe, and I am confident that current standards of conduct within the intelligence community are such as to create no real likelihood of prosecutions based on current activities.

Nonetheless, in any case that is contemplated, or before the courts at present, or that may arise in the future, I want to emphasize that it would be entirely contrary to the policies and principles of the Director of Central Intelligence, and to my own convictions and principles, to use national security claims as a strategem to prevent or impede the criminal process for purposes of protecting any Government official. On the contrary, it is clearly our responsibility, and I believe ultimately in the best interest of the intelligence community, to have a full and fair adjudication of any serious allegation of criminal conduct by Government officials, especially those within the intelligence community.

On the other hand, the paramount responsibility of the Director of Central Intelligence is to insure that this country has a strong and effective intelligence system. To this end, it is indispensable to protect intelligence sources and methods from public disclosure for all but the most compelling reasons. Where a criminal prosecution involving classified information threatens to expose sensitive intelligence source and method information, it is the duty of the Director of Central Intelligence, and of the intelligence community agency heads and general counsels, to seek as vigorously as they know how to portray to the Department of Justice, the Attorney General, and, if necessary, to the President, the risks to national security that would arise from disclosure of such information, even if that means the dismissal of the prosecution is the result. I make no apologies for CIA's performance of this role, nor for the fact that in certain cases the need to protect sensitive intelligence information has been determined to outweigh the interest in successful prosecution of crimes. I can assure the committee that such decisions are not made unilaterally by the Director of Central Intelligence, nor by the Agency, nor does the CIA engage in concealment of information from the Justice Department. When the Agency objects to the use of sensitive information in the criminal prosecution process, we are careful to inform the prosecutors precisely what is at issue. Typically, there is vigorous debate, frequently leading to resolution only at the highest levels of the Jutice Department or, on occasion, of the executive branch.

In the present state of the law, every criminal case in which classified intelligence information may be involved tends to become a source of painful confrontation between the affected intelligence agency and

the Criminal Division of the Justice Department. Frequently these are cases in which the intelligence agency has no interest or involvement other than as a source of potentially relevant information. Contrary to some depictions, a significant number of recent graymail situations have not been prosecutions or contemplated prosecutions of Government officials or of private parties having some relation to the intelligence community. Rather, they have been actual or contemplated prosecutions under the espionage laws or in areas unrelated to intelligence activities in which classified information somehow is brought into the picture. Because there is currently no way to determine with precision how the courts in such cases will handle discovery questions concerning the relevance and admissibility of evidence or the Government's desire to limit the disclosure of sensitive information, the Department of Justice exerts great pressure on the intelligence agencies involved to declassify or to agree to make available for use at trial nearly all information related to the case. While the reasons for such pressure, to insure against the sudden collapse of a case at trial, are understandable, the current process is not always conducive to rational, orderly decisionmaking.

And I might add parenthetically, departing from my prepared statement, that I would say it is almost never conducive to rational, orderly decisionmaking because so many of these decisions have to be made on a very short time fuse in the course of trial or on the eve of trial.

The great advantage of the proposed graymail legislation from my point of view is that it should bring about a substantial reduction of these painful and often unnecessary confrontations between the interests of criminal law enforcement and the protection of intelligence sources and methods, by clearly establishing the power of the courts to employ procedures that will bring a measure of certainty and predictability to the prosecutorial decisionmaking process.

The legislation will do this in a number of ways, the most important of these being the establishment of procedures for prior notification of intended use of classified information, early determinations of the relevance of information, and interlocutory appeal by the Government of adverse trial court rulings on these issues. In this way, the threatened exposure at trial of information that in the end is not relevant or admissible would not prematurely cause a prosecution to be aborted. I will not dwell on the provisions which authorize these procedures, found in sections 5 through 7 of the administration's bill, since they have been covered extensively in prior testimony.

In addition to creating a procedural framework for an orderly determination of what sensitive information will be needed to support a prosecution, a second major salutory feature of the proposed legislation is that it provides means by which classified information that is necessary and relevant to the conduct of the criminal case, whether from the prosecution or defense point of view, can be used in some circumstances without threatening a damaging public disclosure of sensitive intelligence information. Unlike H.R. 4736, both the administration's bill and S. 1482 contain provisions that would remedy troublesome problems which now confront the Government during the actual introduction of classified evidence at trial.

For example, section 8(a) of H.R. 4745 provides that documentary evidence may be admitted at trial without change in its classification status. This would permit the Government to introduce a document classified secret as it is, with no requirement for formal declassification or removal of classification markings. In the past, CIA and other entities of the intelligence community have been called upon by the Department of Justice to declassify various documents said to be needed to support a prosecution. If such documents are validly classified, however, it makes little sense to call for their declassification simply because they will be used in some fashion at trial. Declassification necessitates a finding that public disclosure will not harm the national sceurity, a finding at odds with an essential element of the crime under many of the espionage laws.

Furthermore, the rules on classification do not require that a document be declassified in order to be shown to a limited number of uncleared users, if circumstances make it in the interest of national security to do so. As Admiral Turner said when he testified before the Secrecy and Disclosure Subcommittee of the Senate Select Committee on Intelligence in March 1978, the use at trial of a validly classified document "merely recognizes the situation for what it is, namely one in which a national security risk is being taken to achieve a law enforcement purpose that cannot be achieved in a risk-free way." Under section 8(a) it would be left up to the agency involved to determine if a particular document has been so compromised through use at trial as to require formal declassification. If no declassification is called for, such a document would be subject to continued protection under the security procedures called for by section 9 of the bill.

Section 8(b) provides the court with authority to order the excision of all or part of the classified information contained in a document to be admitted in evidence. This provision will allow for the protection of classified information not central to the purpose for which the document is to be admitted in evidence. As Assistant Attorney General Heymann pointed out when he testified before the committee last month, the Government was able to delete some sensitive classified information from the highly classified manual that was introduced in the *Kampiles* espionage prosecution because the defendant gave his consent. Section 8(b) would allow the court to order such deletions over a defendant's objection in a situation where the deleted information is not relevant and material to the person's defense.

Section 8(c) would permit the Government to prove the contents of a classified document without actually introducing the original or a duplicate into evidence. By allowing other evidence, such as testimony, to prove the matters for which the document would otherwise be admitted into evidence, the subsection will enable the Government to protect some classified information in the document from unnecessary disclosure. This provision could be particularly useful in a case under 18 U.S.C. section 794 involving an unsuccessful attempt to deliver classified documents to an agent of a foreign government. Where attempted espionage has been nipped in the bud, it seems particularly tragic that the Government has to disclose publicly the

very information it has prevented the defendant from passing to a foreign power. By relying on testimony to prove that the particular documents involved are related to the national defense, the Government could minimize the damage to the national security that might otherwise be incurred through introduction of the documents in evidence.

Through testimony, the Government would be able to focus on specific matters of its choice to prove that a given document relates to the national defense, without exposing the entire document at public trial. Classified photographs are a type of documentary evidence for which subsection 8(c) would seem particularly well suited. The defendant would be free, of course, to cross-examine in detail on any matter put in evidence by the Government, or to introduce classified information on his own behalf if notice has been given under section 5 and the procedures established by section 6 have been followed.

The final provision in section 8, subsection (d), permits the Government to object during the examination of any witness to a question or line of inquiry that may result in the disclosure of classified information that has not been found previously to be admissible pursuant to the procedure established by section 6. This provision is necessary in order to make it clear that the Government has a right to prevent the intentional or inadvertent premature disclosure of classified information at trial, by permitting the Government to object and obtain a ruling from the court on the appplicability of the *in camera* procedure established by section 6.

Other provisions of the bills are of importance to the intelligence community. Section 9 of the administration's bill calls for establishment of security procedures by the Chief Justice of the United States in consultation with the Attorney General, Director of Central Intelligence, and Secretary of Defense, to protect classified information submitted to the Federal courts. Both H.R. 4736 and S. 1482 contain similar provisions. The security measures listed in section 4 of the administration's bill are suggested as guidelines pending the establishment of a more specific procedure by the Chief Justice.

The CIA views the security procedures required by all three bills as a necessary and valuable part of the procedural framework established by this legislation. Under the administration's bill, for example, classified information will be submitted to the courts in a variety of contexts. Some classified evidence may be introduced at trial in a manner which will not put it in the public domain. In the prosecution of former CIA employee Edwin G. Moore for attempted espionage, the Government introduced classified documents which contained the names of CIA employees under cover. There was no cross-examination on these documents, and the court ordered that protective measures be taken during and after trial, which prevented the names of the undercover employees from reaching the public domain. The establishment of uniform procedures to provide such protection in all cases will be more reassuring and welcome.

Classified information would be submitted to the court by the Government ex parte under section 6 of H.R. 4745 to demonstrate to the court that an in camera proceeding concerning relevance is warranted. It is contemplated that some such submissions would involve

disclosures of classified information to the court in greater detail than that which would be necessary for trial. Such submissions will call for the highest degree of protection. After the in camera proceeding and the court's rulings on relevancy and admissibility, there is the possibility of appeal by either or both the Government and the defendant. In such situations, the documents involved will presumably leave the custody of the trial court and be transferred to a court of appeals. On appeal, classified briefs may be written and classified affidavits filed. The appellate process will present great risk of inadvertent disclosure or loss of classified materials unless there are uniform and strict procedures to guard against such occurrences. Fortunately, the Foreign Intelligence Surveillance Act of 1978 has broken the ground in this area. Under FISA, the Chief Justice, in consultation with the Attorney General and the Director of Central Intelligence, has promulgated security procedures that effectively safeguard the classified information involved in applications to the FISA court. I am confident that similar effective procedures will be established if this legislation is enacted.

In closing, I would like to thank the committee for this opportunity to prevent the views of the Director of Central Intelligence and the Central Intelligence Agency on this important legislation, and to commend the committee for its efforts to find a solution to the legitimate and painful problems that arise when sensitive intelligence information is drawn into the prosecution of criminal cases. I believe H.R. 4745 contains the elements of a sound and equitable solution to the graymail problem, as do the similar bills before you. If this legislation is enacted, I am confident that the Director of Central Intelligence, the intelligence community, the CIA, and the Department of Justice will be able largely to eliminate the graymail phenomenon and to protect legitimate national security information from unnecessary disclosure, while at the same time ensuring effective and impartial enforcement of the laws and a fair trial for every defendant.

That concludes my prepared statement, Mr. Chairman. I will be glad to answer any questions.

Mr. MURPHY. Thank you, Mr. Silver. As usual, a fine presentation.

A question I had, and it relates to the testimony this morning of Mr. Greenhalgh. You say that in the *Moore* case, the Government introduced classified documents which contained the names of CIA employees under cover. There was no cross-examination on these documents and the court ordered that protective measures be taken during and after trial which prevented the names of the undercover employees from reaching the public domain.

Mr. Greenhalgh stated that one of the fundamental rights under the Constitution is the power of cross-examination, and I am wondering in this particular set of facts, was this right prevented or taken away from the defendant?

Mr. SILVER. I would have to defer to Mr. Lapham to answer that question since he has, I believe, the firsthand experience with that situation.

Mr. LAPHAM. The answer, Mr. Murphy, is no; there were no steps taken to restrict or in any way obstruct the right of defense counsel in that case to conduct a cross-examination. He chose for tactical

reasons not to examine with respect to the document, presumably for the reason that he thought the examination would make his case worse rather than better. So it was a stroke of good fortune, and indeed many of these cases have turned out to stand or fall on strokes of good luck.

Mr. MURPHY. Thank you.

Mr. SILVER. I cited the case in this portion of my statement as a example of a situation in which it is necessary to have rigorous security procedures to protect the documents because they will contain, often do contain information that has not been made public.

The more general issue that you allude to I think is not a real issue. What the administration bill proposes in terms of deletions of information from documents should not effectively deprive any defendant of the right of cross-examination. I think one has to start with the proposition that since the Government bears the burden of proving the defendant's guilt beyond a reasonable doubt, the Government should be able to choose the elements of its proof. Obviously anything that is introduced into evidence is fair game for cross-examination, but in a case where one has potentially 100 items of classified information and chooses to base a prosecution on 50, be they separate documents or discrete items of information within a single document, I don't see any reason why cross-examination should be permitted to proceed on fifty items that the Government is not putting into evidence, and in a case, if one had a case where the identities of undercover employees were not relied upon by the Government as an element proving the national defense or classified nature of the documents, it seems to me that there is no infringement on the right of cross-examination if the court rules that that is outside the scope of that examination.

Mr. MURPHY. Mr. Ashbrook?

Mr. ASHBROOK. Thank you, Mr. Chairman.

Title II of H.R. 4736, as well as the Biden bill, contains provisions requiring the Justice Department to promulgate guidelines specifying the factors to be used in deciding whether to prosecute a case or not where national security information may be disclosed. It also requires the Justice Department to submit written findings to this committee when a decision not to prosecute is made.

Would you give us your full review and expertise on this particular provision?

Mr. SILVER. I would oppose that position on two grounds. First, I think there is a serious separation of powers objection to any provision that requires the executive branch to report regularly on an item-by-item basis to the Congress on its decisionmaking process. I certainly recognize the legitimate oversight roles of the Congress in calling the Justice Department to question, seeking further information on how these decisions are made generally or in any particular case, but I think that a requirement as set forth in title II of that bill is an unwarranted intrusion into the management and decisionmaking prerogatives of the executive branch.

Second, I think it would be ineffective to acomplish whatever end is sought to be accomplished. Certainly I have had occasion myself to take exception to prosecutorial decisions or nonprosecutorial decisions that the Justice Department has made in various kinds of cases, but I

don't think those decisions would have changed one whit if the Department had been required to file with the Congress an explanation of why they were made, nor if they had been required to promulgate guidelines. These are all ultimately questions of judgment, prosecutorial judgments as to how strong a case there is to take before a jury or how strong a case there is to start an investigation, and I don't think that the act of having to articulate the reasons will necessarily change the decisionmaking process within the Justice Department at all.

Mr. ASHBROOK. Well, separating it into two parts of that question—the first part, of course, is the guidelines—I, speaking as a legislator, have seen numerous examples. Take the McGovern amendments on immigration where it appears to many of us that, given the prerogative or the desire to open up visas in this country, the State Department went overboard and in 1 year didn't even in one case, not even in one case go along with Justice Department, the FBI or any of our intelligence-law enforcement agenies in excluding a person who wanted to come into this country. In that situation, I think the Congress clearly and properly asked the State Department to give us reports, give us the basis of its decisions, and I look upon this a little bit the same way. Maybe I look at it from the legislator's perspective.

But let me separate the two parts of my question—the first was the promulgating of regulations. I take it from what you say you don't have any objection to that provision.

Mr. SILVER. I don't have a strong objection to it but I have great skepticism as to what it will accomplish. I think I could probably write for you the guidelines that the Justice Department would issue. They in fact have principles; they don't make these decisions in a vacuum. They have certain principles, including the important and laudable principle that they will not institute a prosecution unless they feel they have a substantial chance of obtaining a conviction, and most of the decisions not to prosecute in cases that involve classified information go off on an appreciation by the Criminal Division or Attorney General that they will not be able to obtain a conviction.

I find it hard to see how the promulgation of these guidelines will really contribute much to the process or change any situation that may exist today.

Mr. ASHBROOK. Well, of course, we probably come down on the same side for different reasons. My experience on guidelines, having spent 20 years in intelligence from a legislative standpoint, is that they usually inhibit good intelligence, for the most part, at least that I have seen over the years.

But going back to your statement, I am a little surprised. Do you look upon the submission of written findings to this committee, when a decision not to prosecute is made, as opening up the sensitive decisionmaking process, or do you look upon it as just an intrusion in the executive or judicial functions of our Government, or putting the legislative branch unwisely in that area?

Of course, we wouldn't be in on the takeoff, we would be in on the landing, after the decision is made. We would only be finding out why that decision was made, so we wouldn't be a part of the process of making that decision.

I guess I am struggling to find out why you think that would inhibit the orderly process in the Justice Department.

Mr. SILVER. I didn't mean to say that I thought it would necessarily inhibit anything.

Mr. ASHBROOK. Well, you thought it was a bad policy. I guess I put words in your mouth.

Mr. SILVER. It represents in my view—and this is entirely a personal perception—a step over the proper line of separation of powers between the legislature and the executive by, in effect, providing, if you will, instant oversight of each and every decision made in a particular area by the Justice Department. That is a relatively unusual kind of oversight, and I think it is not consistent with the relationship that exists and traditionally has existed between the two branches of Government.

Mr. ASHBROOK. This isn't a right that the judicial branch or the Justice Department has operating on its own. It comes from a legislative nexus anyway. I guess I see some of your concern, but I don't see it as an overreach. But, I asked for your opinion, not to argue it.

Thank you, Mr. Chairman.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Thank you very much, Mr. Chairman, and welcome again, Mr. Silver.

You have stated your support for the provision in the administration bill, section 8(a), which deals with admitting into evidence classified information without having it declassified, and I wonder if you might address yourself to that point, whether you think that is the proper situation with regard to the public's right to know what goes on in a trial? Does this provision conform to current practices in the courts? Just what would be your observations about that?

Mr. SILVER. Current practice in the courts, I think it is fair to say, vary, and there is no standard practice. In terms of the public's right to know, that also is a somewhat unclear and controversial issue in the law, in the wake of recent Supreme Court decisions.

Obviously the quandary that we have in the graymail situation or in the, more generally, the situation where classified information is involved, is that if the public has a total right to know everything related to the case, most of the time there will not be a case, and in fact, we have to accept giving a grant of immunity to people who steal classified documents, who engage in espionage, or who engage in a variety of other reprehensible conduct in which classified information is relevant to prosecution or defense.

I find that an unaceptable path to follow. I think that an accommodation of the interests of public knowledge, the right to public trial, and the protection of classified information can be found without sealing the courtroom and having the trial conducted out of the sight of the public. And I cite to you the *Kampiles* case in which the public never saw the manual in question—now, that was by agreement between the parties and not by virtue of law such as proposed in this bill, but the result was the same. There was extensive press coverage. It seems to me that the public was copiously informed as to the theories of the defense, a great deal about the generic nature of the classified information involved, and the Government's assertions of the damage to the national security, and anything that the defense had to say in

rebuttal, and that both the public interest in the judicial process and the defendant's interest in having a public watchdog over the fairness of the trial were adequately met. Yet the document was not disclosed.

Now, the quandary that we are in today is the Justice Department, unsure of what is going to happen in the courtroom, would like us to take that classification stamp off the document before the trial even begins. If we do that, we are then in a position where even if the document is not used in evidence, or is admitted as it was in *Kampiles* without public disclosure, someone has, according to the logic of the system, made a finding that it no longer requires protection against disclosure, and again the logic of the system says you can't stuff the cat back in the bag.

This hasn't occurred yet, but I would be very concerned about what would happen if someone made a Freedom of Information Act request for that document subsequently and we had to litigate the validity of the classification after removing the markings and then putting them back on after the trial.

Mr. MAZZOLI. Refresh my memory. In the *Kampiles* case, did the attorney for Kampiles have access to the unexpurgated technical manual?

Mr. SILVER. I will have to defer to the expert on that.

Mr. LAPHAM. Yes, Mr. Mazzoli, subject to a protective order, the provisions restricting the right to further disseminate that information, also restricting the right to make disclosure with respect to particularly those parts of it which were deleted from the copy that was placed into evidence at the trial.

Mr. MAZZOLI. So a copy was placed in evidence with deletions in it. However, the attorney had seen the original and was just by reason of this protective order prohibited from disseminating that deleted material plus all the other, all the rest of the classified document, and the attorney couldn' develop any positions in trial which would involve the disclosure of this deleted material.

Mr. LAPHAM. Not without an additional authorization from the court, which he never sought.

Mr. MAZZOLI. Right.

Mr. Silver, let me ask you, you were here I guess it was months ago when we had a panel. I think Tony was here with the gentleman from the Justice Department, Mr. Keuch, and it became pretty evident that there was not a lot of cooperation, that there was sort of a tension, and yet subsequently we found out that maybe things might improve.

Before you went to the CIA, or even since that time, have you sensed any positive change in the handling of these cases as a result of just a better use of current rules and regulations and better contact between parties, and basically would that be enough or do you believe you need some legislation like this?

Mr. SILVER. I believe quite strongly we need the legislation. I don't think the relations between the intelligence agencies and the Justice Department are any different today than they were the last time Mr. Lapham and I and Mr. Keuch testified here, and as we said then, there is cooperation, and particularly at the senior levels, between the general counsels and Mr. Heymann, for example, but there is an inherent tension, and as the going gets hotter and heavier, the relations tend to become frayed.

The prosecutor wants to take into court the best case that he can. If I were a prosecutor, I would certainly follow that course. That means that even if he is convinced in his heart that he can win with one unit of evidence, if there are five units of evidence lying around, he would like to throw them all at the jury.

I feel that it is my responsibility in dealing with the Justice Department in a case like this to try to persuade them to take as little as minimally possible if the additional evidence would cause damage to the national security from the intelligence community's perception. And there is a certain war of nerves or game of chicken that goes on up to the day the trial opens in that kind of situation that is basically unhealthy for the intelligence community and for the whole system of justice, in my view.

Mr. MAZZOLI. Well, I certainly thank you very much. You have been very helpful.

Mr. MURPHY. Does counsel have any questions?

Mr. O'NEIL. Mr. Silver, in section 6(c)(2) of 4745 the Government presents a standard for admissibility which is somewhat different from that which pertains under the Rules of Evidence. Something must be relevant and material to the element of the offense, a legally cognizable defense and otherwise admissible as opposed to being simply relevant or admissible, and it has been suggested that this would presently be permissible in the Federal courts along a theory which closely parallels that advanced in the *Roviaro* case. That is different from the subcommittee's approach.

Can you describe why you feel that is the appropriate standard?

Mr. SILVER. I believe that the thinking behind this is an attempt in confronting the graymail phenomenon to deal with the situation of evidence that is in some fashion relevant in the largest sense of the word, but is not probative, in some cases may even be counterproductive to the defense position, but which for graymail or blackmail tactics, the defense is attempting to put into evidence. The attempt here was to, staying always within the limits of the Constitution and of fundamental principles of fairness, to narrow down in the area of classified information the issues to those things that need a standard both of relevance and of materiality to the offense or an element of defense that is legally cognizable. There are, of course, a lot of elements of defense that may be tactically useful in the sense of throwing dust in the eyes of the jury or inflaming their passions. In some criminal cases where there are no other considerations at issue, a fairly wide latitude is allowed to the defense, but in a case where national security information is involved, I feel that a stricter standard of relevance and materiality is appropriate.

Mr. O'NEIL. Do you view it as simply a stricter standard for what might marginally be relevant, or do you consider it a balancing between a national security concern that might be applied to that particular piece of information and the marginal relevance?

How would you characterize it?

Mr. SILVER. I don't think the language of the statute invites balancing. It attempts to establish a standard. Now, in its application I suppose that materiality being a judgment call, there may be some element of balance involved. But it is not a balancing standard.

Mr. O'NEIL. Thank you.

Mr. MURPHY. Counsel?

Mr. GOLDMAN. Section 111 of the committee bill states that the Government shall notify the defendant regarding certain portions of material that it is going to bring into evidence at trial. This was put in, I believe, primarily to cover a case where adefendant is charged with transmittel of a 500-page document and the Government wants to refer only to maybe 10 pages.

Do you see any reason for inclusion in this section of a provision that would limit the defendant's inquiry into the nature of the material to those areas that the Government has already specified it would concentrate on?

Mr. SILVER. That is, in effect, the theory of the administration's bill, and it seems to me that what is provided in secion 111 would be, in any event, a necessary consequence of the kind of procedures that are set up in the administration bill because the prosecution, under the administration bill, let's say in your 500-page document where the administration wanted to rely only on the first 10 pages, would be seeking an order from the court to excise 490 pages for purposes of trial, and that would give notice to the defendant.

I view the underlying principle of procedural techniques embodied in the administration bill as that of the right of the prosecution, which has the burden of proof, to choose the evidence and the elements on which it wants to base its case. Since the Government wants to go into court with a weaker case than it conceivably could bring in order to protect other valid governmental interests, then all we are asking is that matters extraneous to that case not be brought into evidence and brought into jeopardy by the defendant.

Mr. GOLDMAN. Well, then, is section 111 as it is worded now inadequate?

Mr. SILVER. I don't think it is inadequate. It may turn out in practice to be superfluous if the procedures provided for in the bill are followed.

Mr. GOLDMAN. Thank you, Mr. Chairman.

Mr. MURPHY. Thank you, Mr. Silver. We appreciate your testimony again and your great service to this subcommittee.

Our last witness this afternoon is Mr. Lapham, formerly the General Counsel of the CIA. Admiral Turner had to search long and hard to find Dan Silver to replace Mr. Lapham because he was such a truly valuable legal adviser. He was and is one of the most convincing witnesses to appear before the subcommittee.

Tony, we welcome you once again and look forward to your testimony.

STATEMENT OF ANTHONY A. LAPHAM, FORMER GENERAL COUNSEL, CENTRAL INTELLIGENCE AGENCY

Mr. LAPHAM. Thank you, Mr. Chairman. It is a pleasure to be back even though I am appearing today obviously in a private capacity and not as a representative of the Director of Central Intelligence.

I am thankful for the opportunity to testify regarding H.R. 4736 and H.R. 4745, both of which would regulate the handling and use of classified information in Federal prosecutions.

On virtually every page of these two bills there appear provisions that would deal with various problems that plagued both the Department of Justice and the intelligence agencies throughout the 3-year period of my service as General Counsel of CIA, ending this last May. Looking back on that 3-year experience, I now believe that some of the problems we encountered would never have arisen at all, and many others could have been much more easily and safely resolved, without impairing the fair trial rights of any defendant, had there been on the books legislation of the kind this committee is now considering. For that reason and others, I support the legislation, and I believe that its enactment would improve the administration of criminal justice in those cases, seemingly increasing in number, in which classified information is of true or asserted relevance.

As matters stand today, it is anybody's guess how classified materials will be handled in any particular case. There are few fixed points of reference or accepted ground rules in this regard, and as I testified at the committee's background hearings last January, the issues have an unpleasant way of coming into focus late in the day, on the eve of trial, or during trial itself when there is little chance for reasoned judgment or thoughtful weighing of competing interests or alternative courses of action. Granting that there may be unpredictable issues in any criminal case, in too many instances even predictable issues with national security aspects are not forced to the surface in time to permit a measured response. It is also a fact that matters of an apparently routine nature, capable of standardized treatment from one case to the next, as for example the terms of protective orders under which classified materials are made available to defense during discovery and the conditions under which such materials are maintained and safeguarded before, during and after trial, are subject to ad hoc and differing resolutions depending on the preferences of individual prosecutors and judges. One result of all this is that the process of reconciling law enforcement interests and national security interests is more uncertain, more hectic and disorderly, and more dangerous to both interests than it needs to be.

The central purpose of the proposed legislation, as I conceive it, is to cut down the uncertainty and the risk, so that prosecutions are not needlessly abandoned or legitimate secrets are not needlessly exposed, without diminishing the rights of the defendants. The second element of this purpose is of critical importance. So far as I know, nobody favors the idea of creating a disadvantaged class of defendants whose rights would be traded or balanced away in order to serve national security objectives, and I could not support the legislation if I thought it was intended to have such an effect. Instead, however, the general idea of the legislation, again according to my conception of it, is to stay within the framework of the existing Federal Rules of Evidence and Criminal Procedure, and on the one hand to articulate a set of requirements that are consistent with those rules and on the other hand to make explicit certain authorities that are now implicit in those rules. With a few execptions, some of which are admitedly controversial, there are no provisions in either of the two proposed bills that would either require or authorize any step or procedure that could not be required or authorized today, drawing on existing sources of judi-

cial authority and discretion. Indeed, many of the procedures prescribed by these bills have already been utilized at one time or another. Were these bills to be enacted, therefore, the net effect would be not so much to establish a new and distinctive body of law applicable to cases in which national security information was at stake as it would be to pull together in a consolidated format various procedures that have already been employed or that are potentially available in such cases, and to state a congressional direction that these procedures be applied in a uniform manner.

As between H.R. 4736 and H.R. 4745, my view is that the latter is the better bill, although I agree with both Mr. Heymann and Mr. Silver that the similarities are more important than the differences, and that either bill would represent an advance as against the present state of affairs. The fundamentals that should be preserved in any version of the legislation, and that are common to both the proposed bills are, in my opinion, as follows.

First, there should be a prior notice provision of the kind contained in section 102(a) of H.R. 4736 and section 5 of H.R. 4745, and supplemental provisions of the kind found in sections 102(f) and 8(d) of the respective bills, to take care of situations in which defense counsel embarks on a line of inquiry that calls for the disclosure of classified information not authorized to be disclosed by pretrial ruling.

Second, there should be an in camera opportunity for the Government to contest the admissibility of any classified information that a defendant declares an intention to use, and to obtain judicial rulings on that issue prior to the intended disclosure, as provided by section 102 and 6 of the respective bills.

Third, there should be provisions such as those in sections 103(a) and 109(b) of H.R. 4736 and sections 4(b) and 6(c)(3) of H.R. 4745, authorizing trial courts to consider and approve alternatives to the disclosure of classified information, as for example summaries or admissions of fact, whenever the alternative can be shown to be of equivalent value in terms of the ability of the accused to prepare or present a defense.

And fourth, there should be a provision, as in sections 105 (b) and 7 of the respective bills, granting the Government at least a limited right of interlocutory appeal from adverse trial court determinations authorizing the disclosure or use of classified information.

I would react favorably to any legislation built around the fundamentals to which I have just referred. In saying that, however, I do not mean to slight the other provisions in the proposed bills or to suggest that a bill narrowed to its essentials would be the best of all possible bills. On the contrary, because the goal is to reduce the guesswork and the risk in cases involving national security information, I favor a more comprehensive legislative approach.

So, for example, I would hope that any bill would include protective order provisions, and on this score I think section 4(a) of H.R. 4745 is preferable to section 109(a) of H.R. 4736 because the former contains guidance as to the appropriate contents of a typical protective order, leaving less room for random decisions and promoting uniformity. Similarly, I strongly favor the provisions in sections 110 and 9 of the two bills regarding the adoption of security procedures

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to govern the storage and safeguarding of classified materials in judicial custody. I also favor the provisions in section 8 (a) through (c) of H.R. 4745, which have no counterpart in the other bill, regarding the introduction of classified evidence.

So far as concerns the actual detail of the two bills, I have little to add to Mr. Heymann's August testimony which covered the subject rather thoroughly and with which I very largely agree. I would like, however, to comment on some of the objections that have been voiced with respect to the administration bill.

One of the principal objections has to do with section 10 of H.R. 4745 which would amend the Jencks Act in such a way as to authorize prior statements of Government witnesses to be withheld from the defense insofar as such statements were found to be both properly classified and consistent with the trial testimony of the witness. I am not aware that the Jencks Act has been a frequent or serious obstacle to the prosecution of cases involving national security information, and in any event, I think the objection to the proposed amendment is well founded. The consistency of a prior statement and the trial testimony of a witness is not a true or complete test of its utility to the defense for purposes of cross examination, and it therefore seems to me that the proposed amendment indeed does have the potential for depriving a defendant of material that is more than marginally relevant to the defense. If section 10 is to be retained at all, I would soften its impact by providing instead that prior statements may be withheld only insofar as a court determines that they are properly classified and that they contain nothing of material value to the defense. The consistency of the statements and the testimony could be one pertinent factor in making such a determination, but it should not be the only permissible factor to consider.

There is one other aspect in which I believe that H.R. 4745 tilts the balance unfairly against an accused. Section 4(b)(1) of that bill provides that where classified materials are properly within the scope of discovery, a court nevertheless must approve Government requests to make an alternative form of disclosure, as for example a summary or admission of fact, "unless the court determines that disclosure of the classified information itself is necessary to enable the defendant to prepare for trial." Section 6(b)(3) sets forth a comparable standard with regard to disclosures to be made in trial settings rather than discovery settings. For my own part, I doubt that courts could often make the strong affirmative findings in favor of the defense that are contemplated by these sections, especially given the fact that the finding will generally be based on *ex parte* proceedings from which defense counsel is excluded. I would adjust these provisions so as to authorize alternative forms of disclosure only if a court determines that such action would not materially impair the ability of the accused to prepare or present a defense. In other words, I would modify the nature of the required findings in such a way as to place somewhat more of a burden on the Government to justify an alternative form of disclosure. I would also add a provision to section 4(b) requiring notice to a defendant whenever an alternative form of disclosure is approved, so as to make possible the exercise of the statutory right of objection to this procedure.

For the rest, I do not agree with the objections that have been lodged against H.R. 4745, although I believe at least some of these objections could be accomodated without doing any real violence to the legislation. I particularly do not agree with what I regard as the underlying premises of some of the objections, namely, that there is no proper place in criminal proceedings for any *ex parte* proceedings and that under all circumstances the defendant has a guaranteed right to participate in all deliberations as to what materials are relevant to the defense.

I commend the committee for its efforts to develop legislation in this complicated field, and I would be pleased to answer any questions.

Mr. MURPHY. Mr. Lapham, that is the second bell. Would you be kind enough to wait? We can come back. We shouldn't be more than 5 minutes.

Mr. LAPHAM. No problem at all.

[A brief recess was taken.]

Mr. MURPHY. The meeting will come to order.

Mr. Lapham, what do you think of the proposals we have received suggesting that we legislate changes in the Federal rules rather than the permanent statute as considered in the various bills before us?

Mr. LAPHAM. I think the principal disadvantage of that approach, Mr. Murphy, is that it cuts up the bill into as many different pieces as there are different rules that might have to be amended or modified to pick up all that is in this legislation. One of the advantages of the other approach, I think, is that you keep in one place where somebody can see at one time something like a procedural manual for national security cases, and I think that is a benefit that you shouldn't lightly give up. There are other ways to accomplish the kind of reviews that would occur if the legislation took the form of amendments to the rules. One way, I suppose, would be to write a sunset provision into the law requiring a congressional review at the end of a period of years so that various committees and professional bodies and so forth could be called upon to state their opinion at that time as to how well this legislation had worked. I think on balance I tend to prefer the approach that is embodied in these bills.

Mr. MURPHY. Mr. Mazzoli?

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. Lapham, welcome, of course, and we wish you well.

You were here before, and you were part of the panel which included Mr. Silver and Mr. Keuch in which it became evident to the subcommittee that there was confusion or at least some concerns as to the willingness of the parties to work together.

Are you satisfied that despite the very best working relationship that can be developed, there is still a need for this kind of legislation which is before the subcommittee to solve the problem?

Mr. LAPHAM. Yes. I'm convinced in my own mind, Mr. Mazzoli, that there is a genuine need for this legislation. It is true that one of the consequences, I think, of not having the legislation is that more misunderstandings occur between the Department and the intelligence agencies than would occur if this sort of guidance was written into the law.

I also think, Mr. Mazzoli, that the country has paid some price by virtue of the fact that no legislation of this sort existed. The price

doesn't take alone the form of misunderstandings between intelligence agencies and the Department of Justice. It takes other equally serious forms. It may, for all I know, create something of a public perception that there is a class of favored defendants who are in a position to exploit the judicial system because of their access to secrets. My impression is that Mr. Heymann feels that there is that sort of a public perception. The price has been paid in terms of prosecutions that have been abandoned, although there have been very few of them, that might otherwise have been successfully undertaken, and I think frankly we have been lucky as a country that the price hasn't been worse.

As I said when I was speaking from the back bench here a moment ago, there have been any number of cases, more than I like to think about anymore, when some very important prosecutions very nearly floundered because we couldn't find in the time that was available, or very nearly couldn't find answers to the kind of questions that this legislation would help to resolve.

Mr. MAZZOLI. You said something today which was akin to what Mr. Lacovara said this morning—he used the term synthesis of techniques, and you I think said today that these all had precedents, that they are being used at different times, different places by different julges and in different circumstances. But you still feel like Mr. Lacovara that there is a point and purpose in stating these and writing them into a piece of legislation, and could you expand on that? I think that is probably going to be one area that we as a committee are going to have to answer to the full House. If these have precedent, if the judges can use them, if these aren't unique and novel, then why should we put these down on another piece of legislation, more paperwork and so forth?

Mr. LAPHAM. I think one aspect of the answer is that it isn't altogether correct to say that this proposed legislation is built on an existing framework of law and procedure. That is largely true, and I think that is a very important consideration. There are some exceptions, however. Take, for example, the rights that are granted to the Government to pursue interlocutory appeals from adverse trial court determinations. There is nothing in the law today that authorizes the Government to do that, and indeed, the ITT cases provide a recent example of a situation in which no right of appeal was available.

So there are some features of the legislation that represent new authority.

For the most part, though, what is happening here, at least as I see this bill, is that you are pulling together a set of procedures authorized by the rules as they now stand. The benefit you are going to get from doing it is greater certainly in the acceptance and application of these procedures. Today the situation is you can go to a district court in this particular district, and there is going to be one outcome. You can go to the district court in another district on exactly the same issue, and you are going to come out in a rather drastically different place. So what you are accomplishing is to increase the likelihood that there is going to be an orderly and uniform process followed in these cases.

It is not so much a matter that it couldn't happen today. It rather is a matter that it doesn't happen today.

Mr. MAZZOLI. Le me ask you one last question. It is very hard, I am sure, for you to answer this question, but assuming you represented Kampiles—as I say, it is a very hard leap of faith, but assuming that you represented him, and assuming that the committee bill were the law of the land, would you feel that the committee bill gave you the opportunity to protect your client and to develop for him the very best kind of defense?

Mr. LAPHAM. By committee bill you mean H.R. 4736?

Mr. MAZZOLI. Yes.

Mr. LAPHAM. I would probably say no but I think I would believe yes.

Mr. MAZZOLI. All right, how about the administration bill?

Mr. LAPHAM. I would say no more loudly with respect to the administration proposal, particularly because of the Jencks Act feature of the bill which I am personally opposed to, but also because of the other features of the bill, particularly I think the requirement that it be shown that classified material is both relevant and material to my side of the case before I had any entitlement to use it.

Mr. MAZZOLI. Would the answer be pretty much the same answer with respect to the Biden bill, a fairly louder no than you would have as to the committee bill?

Mr. LAPHAM. I think so, Mr. Mazzoli, but I haven't in the last week or so reviewed the Biden bill, so I am not comfortable about answering.

Mr. MAZZOLI. Thank you very much. That's all the questions I have.

Mr. MURPHY. Counsel?

Mr. O'NEIL. Mr. Lapham, one of the issues presented with these two bills is when the court ought to receive the submission of the Government on the sensitivity of the national security information that is at issue, before or after the court makes its determination on relevance or admissibility. What is your feeling?

Mr. LAPHAM. It is a very hard question. My feeling is that H.R. 4745 makes sense and that the proper time to make that showing to the judge is before he makes his ruling. Let me tell you why I think that.

There will be some instances in which the defendant and the defense counsel don't know where they are in the case, don't know what they have stumbled across. They have asked a question either in discovery, or it could happen in the trial itself, and they don't know what the answer is, but it happens that the answer is a secret. Now, this is not too far distant from circumstances which have actually occurred.

Now, I don't think the Government should be forced into an adversary setting with defense counsel in the room, when the nature of its argument is that a particular classified item of information should not be disclosed to the defense at all. Its position is going to be in that context, we don't believe that this fact is relevant or that the defendant has a need or a right to know it. You have lost the argument already if defense counsel is in the room, and therefore I think there has to be a means by which you can make the argument in an ex parte

fashion. And that is one of the reasons why I think it makes the best sense to make the disclosure to the judge before he is called upon to make the admissibility ruling.

Besides that, there is a very practical consideration here, and that is that judges just don't like to make rulings about anything unless they know what is involved, and you will always be facing a judge who is going to be saying, you know, why are you asking me to do this? I don't even know what the secret is. And he is going to be far more reluctant to make determinations in the Government's favor, even though they may be well justified, if he doesn't know what all the considerations are.

Mr. O'NEIL. Could you explain to us why you feel as well—

Mr. LAPHAM. I think also that if a judge has to make a ruling, this fact either is or isn't relevant, that is the ruling he is being asked to make, and he rules without understanding the national security considerations, then under the committee bill what will happen is that the Government will then go back and tell him look, the secret really was this, Judge, and because this is the secret, you now have to approve an alternative form of disclosure. Well, the judge is going to get very irritated at that point and say well, why didn't you tell me? You put me through that process of trying to figure this thing out and now you tell me that this is a terrific secret.

Mr. O'NEIL. Well, in the administration approach, the decision he makes isn't whether it is relevant, it is whether it is relevant and material. That's the first point.

How does that affect the difficult nature of the decisions he has to make? Does it make it a little easier for him?

Mr. LAPHAM. I'm not sure I know the answer to that, Mr. O'Neil. The distinction between something being relevant and something being relevant and material may be paper thin and it may be a nonexistent distinction for all I know. I am not sure I really understand the distance that separates those two standards, and therefore I have trouble coping with that last question.

Mr. O'NEIL. Well, I guess that would be the problem we would have, too. It would be difficult for us to understand. The Government has a theory which I suppose it intends to develop case by case. That standard is certainly going to affect the kind of decision the court has to make.

Mr. LAPHAM. I must say I doubt that proposition. I think when it comes time to deal with classified information, assuming it is properly classified, a judge is going to apply, whatever you call it, he is going to apply a somewhat higher standard of relevance than he probably otherwise would. I don't think you are going to see judges letting in classified information just because there is some theory that it has some tenuous probative connection with some issue. He is going to take a harder look and apply, probably not calling it by this name, but apply a bit stricter standard. I have no doubt of that.

Mr. O'NEIL. Well, one last question, Mr. Chairman.

Title II of 4736 provides mandated standards by which the Department of Justice will reach a decision on the prosecutability of a case involving classified information, then requires reports to the committees of Congress when decisions are made not to prosecute. What do you think of the efficacy or value of that?

Mr. LAPHAM. As to the guidelines, I agree heartily with what Mr. Silver said a moment ago. I think we could sit around this table and write those guidelines in 10 minutes and you would find them totally uninformative. What they are going to say is, you consider the importance of the case, the seriousness of the offense, the importance of the information, the likelihood of success, the credibility of the witnesses and then you decide, and that the decision must be made by some high ranking official in the Department of Justice. So I think you are going to get nothing for your money by requiring a set of guidelines.

As to the oversight provision, I see that less in terms of a separation of power issue than as a practical kind of issue. I believe that the reporting provision is an unnecessarily blunt and inflexible instrument of oversight. You don't need, it seems to me, a report every time this kind of a case happens, along with a statement of the reasons for it and so forth, because if there is a publicized case or a case that interests the committee, there isn't any reason that you can't call upon the appropriate officials to come and explain to you what happened anyway.

Beyond that, I think what you are talking about here is more a matter of oversight of the prosecuting functions of the Department of Justice than it is the oversight of intelligence activities, and if you write these report requirements into the bill, directing that the reports come to the House Intelligence Committee and to the Senate Intelligence Committee, it won't be long before there is also in the bill a requirement that the reports go to the Judiciary Committee in the House, the Judiciary Committee in the Senate, and before you know it, you are going to have these reports scattered all over town, and at that point it seems to me you tip the balance against the requirement rather than in favor. It is at that point that the oversight is just generating pieces of paper which turn out to be harmful rather than helpful.

Mr. MURPHY. Counsel?

Mr. GOLDMAN. Do the problems which these bills are designed to take care of, in your experience, prevent in any way leak investigations because it is felt that even if you found the culprit, that there would be a problem of graymail, or are they just two different cases I mean, we have heard many reasons why leaks are not followed up, why there is a problem, why they are not investigated, but this is not one of the problems.

Mr. LAPHAM. I don't see a connection. I may be missing something. I don't see a connection. You have heard me express my pet theories on that particular subject. They don't have anything to do with anything in this bill.

Mr. GOLDMAN. OK; thank you.

Mr. MURPHY. Thank you very much, Tony. We appreciate you being here, and good luck to you in your new pursuits.

Mr. LAPHAM. Thank you very much, Mr. Chairman.

Mr. MURPHY. The meeting is adjourned.

[Whereupon, at 2:30 p.m., the subcommittee recessed subject to the call of the Chair.]

APPENDIX I

96TH CONGRESS
1ST SESSION

H. R. 4736

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1979

Mr. MURPHY of Illinois (for himself, Mr. BOLAND, Mr. MCCLORY, Mr. ZABLOCKI, Mr. BURLISON, Mr. ASPIN, Mr. ROSE, Mr. MAZZOLI, Mr. MINETA, Mr. FOWLER, and Mr. DANIELSON) introduced the following bill; which was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

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A BILL

To establish certain pretrial and trial procedures for the use of classified information in connection with Federal criminal cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Classified Information Criminal Trial Procedures Act".

TITLE I—PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION IN CRIMINAL CASES

PRETRIAL CONFERENCES

SEC. 101. At any time after the filing by the United States of an indictment or information in a United States district court, any party to the case may request a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Upon such a request, the court shall promptly hold a pretrial conference to establish a schedule for any request for discovery of classified information and for the implementation of the procedures established by this title. In addition, at such a pretrial conference the court may consider any other matter which may promote a fair and expeditious trial.

PROCEDURES FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 102. (a)(1) Whenever a defendant in any Federal prosecution intends to take any action to disclose or cause the disclosure of classified information in any manner in connection with such prosecution, the defendant shall, before such disclosure and before the trial or any pretrial hearing, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized to do so by the court in

accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within ten days of receiving a notification under paragraph (1) or otherwise learning before the trial or any pretrial hearing that any action of a defendant will require or is likely to result in the disclosure of classified information at the trial or such pretrial hearing, the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue that would otherwise be made during the trial or a pretrial hearing. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within ten days or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court shall authorize the

defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided.

(b)(1) Whenever a defendant in a Federal prosecution intends to take any action to disclose or cause the disclosure, during the trial or any pretrial hearing, of any classified information and the defendant has not given notice under subsection (a)(1) with respect to such disclosure because the interest of the defendant in such disclosure reasonably could not have been anticipated before the expiration of the time for giving such notice, the defendant shall, before taking such action, notify the court and the attorney for the United States of such intention and shall not disclose or cause the disclosure of such information unless authorized by the court to do so in accordance with this title. Such notice shall include a brief description of the classified information that is the subject of such notice.

(2)(A) Within forty-eight hours of the receipt of a notification under paragraph (1), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at

issue. Upon such a request, the court shall conduct such a proceeding.

(B) Any proceeding held pursuant to a request under subparagraph (A) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(C) If a request for a proceeding under this subsection is not made within forty-eight hours or if, at the close of such a proceeding, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(c)(1) Whenever the United States learns during a criminal trial or a pretrial hearing in connection with a criminal

trial (other than by notification pursuant to subsection (b)(1)) that any action of the defendant will result in, or is likely to result in, the disclosure of classified information which has not been the subject of pretrial notice under subsection (a), the United States, by written petition of the Attorney General, may request the court to conduct a proceeding to make all determinations concerning the use, relevance, or admissibility of the classified information at issue. Upon such a request, the court shall conduct such a proceeding.

(2) Any proceeding held pursuant to a request under paragraph (1) (or any portion of such proceeding specified in the request of the Attorney General) shall be held in camera if the Attorney General certifies to the court in such petition that a public proceeding may result in the disclosure of classified information.

(3) If, at the close of a proceeding held pursuant to this subsection, the determination of the court regarding the use, relevance, or admissibility of the classified information at issue is favorable to the defendant, the court, subject to the provisions of section 106, shall authorize the defendant to disclose or cause the disclosure of the classified information at the trial or at any pretrial hearing, but such disclosure may not be made before the time for the United States to appeal such determination under section 108 has expired. If the United States takes such an appeal, such disclosure may

not be made until such appeal is decided. In any order of the court under this subsection that is favorable to the defendant, the court shall specify the time to be allowed the United States to appeal such order under section 108.

(d) Upon receiving a request from the United States for a proceeding under subsection (a)(2), (b)(2), or (c)(1), the court shall issue an order prohibiting the defendant from disclosing or causing the disclosure of the classified information at issue pending conclusion of the proceeding.

(e) Before any proceeding is conducted pursuant to a request by the United States under subsection (a)(2), (b)(2), or (c)(1), the United States shall provide the defendant with notice of the classified information that is at issue. Such notice shall identify the specific classified information at issue whenever that information previously has been made available to the defendant by the United States. When the United States has not previously made the information available to the defendant, the information may be described by generic category rather than by identification of the specific information of concern to the United States.

(f) During the examination of a witness by a defendant in any criminal proceeding, the United States may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible in accordance with the procedures established by

this title. Upon such an objection, the court shall take such action to determine whether the response is admissible as will safeguard against the disclosure of any classified information. Such action may include requiring the United States to provide the court with a proffer of the response of the witness to the question or line of inquiry anticipated by the United States and requiring the defendant to provide the court with a proffer of the nature of the information sought to be elicited.

ALTERNATIVE PROCEDURE FOR DISCLOSURE OF CLASSIFIED INFORMATION

SEC. 103. (a) Upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by section 102, the United States may move that, in lieu of the disclosure of such specific classified information, the court order—

(1) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or

(2) the substitution for such classified information of a summary of the specific classified information.

The court shall grant such a motion of the United States if it finds that the defendant's right to a fair trial will not be prejudiced thereby. The court shall hold a hearing on any motion

under this section. Any such hearing shall be held in camera at the request of the Attorney General.

(b) The United States may, in connection with a motion under subsection (a), submit to the court an affidavit of the Attorney General certifying that disclosure of the classified information would cause identifiable damage to the national security of the United States and explaining the basis for the classification of such information. If so requested by the United States, the court shall examine such affidavit in camera and ex parte.

SEALING OF RECORDS OF IN CAMERA PROCEEDINGS

SEC. 104. If at the close of an in camera proceeding under this title (or any portion of a proceeding under this title that is held in camera) the court determines that the classified information at issue may not be disclosed or elicited at the trial or any pretrial hearing, the record of such in camera proceeding shall be sealed and preserved by the court for use in the event of an appeal.

PROHIBITION ON DISCLOSURE OF CLASSIFIED INFORMATION BY DEFENDANT; RELIEF FOR DEFENDANT WHEN UNITED STATES OPPOSES DISCLOSURE

SEC. 105. (a) Whenever the court denies a motion by the United States that it issue an order under section 103(a) and the United States files with the court an affidavit of the Attorney General objecting to disclosure of the classified in-

formation at issue, the court shall order that the defendant not disclose or cause the disclosure of such information.

(b) Whenever a defendant is prevented by an order under subsection (a) from disclosing or causing the disclosure of classified information, the court shall dismiss the indictment or information. However, when the court determines that the interests of justice would not be served by dismissal of the indictment or information, the court shall order such other action, in lieu of dismissing the indictment or information, as the court determines is appropriate. Such action may include—

(1) dismissing specified counts of the indictment or information;

(2) finding against the United States on any issue as to which the excluded classified information relates; or

(3) striking or precluding all or any part of the testimony of a witness.

FAILURE OF DEFENDANT TO PROVIDE PRETRIAL NOTICE

SEC. 106. If a defendant fails to comply with the notice requirements of subsection (a) or (b) of section 102 and the court finds that the defendant's need to disclose or cause the disclosure of the classified information at issue reasonably could have been anticipated before the expiration of the time for giving such notice under such subsection, the court may

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prohibit the defendant from disclosing or causing the disclosure of such classified information during trial and may prohibit the examination by the defendant of any witness with respect to any such information.

RECIPROCITY; DISCLOSURE BY THE UNITED STATES OF REBUTTAL EVIDENCE

SEC. 107. (a) Whenever the court determines, in accordance with the procedures prescribed in section 102, that classified information may be disclosed in connection with a criminal trial or pretrial hearing or issues an order pursuant to section 103(a), the court shall—

(1) order the United States to provide the defendant with the information it expects to use to rebut the particular classified information at issue; and

(2) order the United States to provide the defendant with the identity of any witness it expects to use to rebut the particular classified information at issue.

(b) If the United States fails to comply with an order under subsection (a), the court, unless it finds that the use at trial of information or a witness reasonably could not have been anticipated, may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.

(c) Whenever the United States requests a pretrial proceeding under section 102, the United States, upon request of the defendant, shall provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the pretrial proceeding. The bill of particulars shall be provided before such proceeding.

APPEALS BY THE UNITED STATES

SEC. 108. (a) The United States may appeal to a court of appeals before or during trial from any decision or order of a district court in a criminal case requiring or authorizing the production, disclosure, or use of classified information, imposing sanctions for nondisclosure of classified information, or denying the issuance of a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General certifies to the district court that the appeal is not taken for purpose of delay.

(b)(1) If an appeal under this section is taken before the trial has begun, the appeal shall be taken within ten days after the date of the decision or order appealed from, and the trial shall not commence until the appeal is decided.

(2) If an appeal under this section is taken during the trial, the trial court shall adjourn the trial until the appeal is resolved, and the court of appeals (A) shall hear argument on such appeal within four days of the adjournment of the trial,

(B) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (C) shall render its decision within four days of argument on appeal, and (D) may dispense with the issuance of a written opinion in rendering its decision.

(c) Any appeal and decision under this section shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

PROTECTIVE ORDERS

SEC. 109. (a) Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States to any defendant in any criminal case in a district court of the United States.

(b) Pursuant to its authority under the Federal Rules of Criminal Procedure, the court may authorize the United States to delete specified items of classified information from documents to be made available to the defendant, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The motion of the United States requesting such authorization (and materials submitted in support of such motion) shall,

upon request of the United States, be considered by the court in camera and shall not be disclosed to the defendant.

SECURITY PROCEDURES

SEC. 110. (a) Within one hundred and twenty days of the date of the enactment of this Act, the Supreme Court of the United States, in consultation with the Attorney General and the Director of Central Intelligence, shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeals, or Supreme Court. Such rules, and any changes in such rules, shall be submitted to the appropriate committees of Congress and shall become effective forty-five days after such submission.

(b) Until such time as rules under subsection (a) first become effective, the Federal courts shall in each case involving classified information adopt procedures to protect against the unauthorized disclosure of such information.

IDENTIFICATION OF INFORMATION RELATED TO THE NATIONAL DEFENSE

SEC. 111. In any prosecution in which the United States must establish as an element of the offense that material relates to the national defense or constitutes classified information, the United States shall notify the defendant, within the time specified by the court, of the portions of the

material that it reasonably expects to rely upon to establish such element of the offense.

FUNCTIONS OF ATTORNEY GENERAL MAY BE EXERCISED BY DEPUTY ATTORNEY GENERAL AND A DESIGNATED ASSISTANT ATTORNEY GENERAL

SEC. 112. The functions and duties of the Attorney General under this title may be exercised by the Deputy Attorney General and by an Assistant Attorney General designated by the Attorney General for such purpose and may not be delegated to any other official.

DEFINITION

SEC. 113. As used in this title, the term "classified information" means information or material that is designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as information requiring a specific degree of protection against unauthorized disclosure for reasons of national security, or information derived therefrom, or any Restricted Data, as defined in section 11 y. of the Atomic Energy Act of 1954 (42 U.S.C. 2014(y)).

TITLE II—DEPARTMENT OF JUSTICE DECISIONS NOT TO PROSECUTE BECAUSE OF POSSIBLE DISCLOSURE OF CLASSIFIED INFORMATION

GUIDELINES PRESCRIBED BY THE ATTORNEY GENERAL

SEC. 201. Within ninety days of the date of the enactment of this Act, the Attorney General shall issue guidelines specifying the factors to be used by the Department of Justice in deciding whether to prosecute a violation of Federal law in which there is a possibility that classified information will be disclosed. Such guidelines shall be promptly transmitted to the appropriate committees of the Congress.

PREPARATION OF FINDINGS WHEN DECISION NOT TO PROSECUTE IS MADE

SEC. 202. (a) Whenever the United States decides not to prosecute any individual for a violation of Federal law because there is a possibility that classified information will be revealed, an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute such individual. The findings shall be prepared within thirty days of the date on which the decision not to prosecute is made and shall include—

(1) the classified information which the United States believes might be disclosed;

(2) the purpose for which the information might be disclosed;

(3) the probability that the information would be disclosed in the event of a prosecution; and

(4) the possible consequences such disclosure would have on the national security.

(b) All findings under subsection (a) shall be promptly reported to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate.

APPENDIX II

96TH CONGRESS
1ST SESSION

H. R. 4745

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

IN THE HOUSE OF REPRESENTATIVES

JULY 11, 1979

Mr. RODINO introduced the following bill; which was referred jointly to the Committee on the Judiciary and the Permanent Select Committee on Intelligence

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A BILL

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Classified Information Procedures Act".

DEFINITIONS

SEC. 2. (a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against un-

authorized disclosure for reasons of national security and any restricted data, as defined in section 2014(y) of title 42, United States Code.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

PRETRIAL CONFERENCE

SEC. 3. At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any other matters which relate to classified information or which may promote a fair and expeditious prosecution.

DISCLOSURE OF CLASSIFIED INFORMATION TO DEFENDANTS

SEC. 4. (a) If the Government discloses classified information to a defendant in a criminal case whether in response to a discovery request, in fulfillment of its due process obligations, or otherwise, the court, at the request of the Government, shall enter an appropriate protective order to guard

against the compromise of the information disclosed to the defendant. The terms of any such protective order may include, but need not be limited to, provisions—

(i) prohibiting the disclosure of the information except as authorized by the court;

(ii) requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

(iii) requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

(iv) requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense;

(v) requiring the maintenance of logs recording access by all persons authorized by the court to have access to the classified information in connection with the preparation of the defense;

(vi) regulating the making and handling of notes taken from material containing classified information; and

(vii) authorizing the assignment of Government security personnel and the provision of Government storage facilities.

(b)(1) The court, upon motion of the Government, shall authorize (i) the deletion of specified items of classified information from documents to be made available to the defendant, (ii) the substitution of a portion or summary of the information for such classified documents, or (iii) the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the court determines that disclosure of the classified information itself is necessary to enable the defendant to prepare for trial. The Government's motion and any materials submitted in support thereof shall, upon request of the Government, be considered by the court in camera and shall not be disclosed to the defendant.

(2) If, pursuant to this procedure, any information is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of guilt of the defendant, the entire unaltered text of the relevant documents as well as the Government's motion and any materials submitted in support thereof shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for its examination in camera for the purpose of reviewing the determination of the trial judge.

NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE CLASSIFIED INFORMATION

SEC. 5. (a) NOTICE BY DEFENDANT.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or where no time is specified within thirty days prior to trial, notify the attorney for the Government and the court in writing. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the Government and the court in writing as soon as possible thereafter. Such notice shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given under this subsection and until the Government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act.

(b) FAILURE TO COMPLY.—If the defendant fails to comply with the requirements of subsection (a), the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the exami-

nation by the defendant of any witness with respect to any such information.

IN CAMERA PROCEDURE FOR CASES INVOLVING CLASSIFIED INFORMATION

SEC. 6. (a) MOTION FOR IN CAMERA PROCEEDING.—Within the time specified by the court for the filing of a motion under this section, the Government may move for an in camera proceeding concerning the use at trial or any pretrial proceeding of any classified information. Thereafter, either prior to or during trial, the court for good cause shown may grant the Government leave to move for an in camera proceeding concerning the use of additional classified information.

(b) DEMONSTRATION OF NATIONAL SECURITY NATURE OF THE INFORMATION.—In order to obtain an in camera proceeding, the Government shall submit the classified information to the court for its examination in camera and shall demonstrate in an ex parte proceeding that the disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable Executive order, statute, or regulation.

(c) IN CAMERA PROCEEDING.—(1) Upon finding that the Government has met the standard set forth in subsection (b) with respect to some or all of the classified information

submitted to the court, the court shall conduct an in camera proceeding. Prior to the in camera proceeding, the Government shall provide the defendant with notice of the information that will be at issue. This notice shall identify the specific classified information that will be at issue whenever that information has previously been made available to the defendant in connection with pretrial proceedings. The Government may describe the information by generic category, in such form as the court may approve, rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the defendant in connection with pretrial proceedings. Following briefing and argument by the parties to the court in camera, the court shall determine whether the information may be disclosed at the pretrial or trial proceeding. Where the Government's motion under subsection (a) is filed prior to the trial or pretrial proceedings, the court shall rule prior the commencement of the relevant proceeding.

(2) Unless the court makes a specific, written determination that the information is relevant and material to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence, the information may not be disclosed or elicited at a pretrial or trial proceeding and the record of the in camera proceeding shall be sealed and preserved by the Government in the event of an appeal. The

defendant may seek reconsideration of the court's determination prior to or during trial.

(3) If the court makes a determination under subsection (c)(2) that would permit disclosure of the information or if the Government elects not to contest the relevance, materiality, and admissibility of the classified information, the Government may proffer a statement admitting for purposes of the proceeding any relevant facts such information would tend to prove or may submit a portion or summary to be used in lieu of the information. The court shall order that such statement, portion, or summary be used by the defendant in place of the classified information unless it finds that use of the classified information itself is necessary to afford the defendant a fair trial.

(4) If the court determines that these alternatives to full disclosure may not be used and the Government continues to object to disclosure of the information, the court shall issue any order which the interests of justice require. Such an order may include, but need not be limited to an order—

(i) striking or precluding all or part of the testimony of a witness; or

(ii) declaring a mistrial; or

(iii) finding against the Government on any issue as to which the evidence is relevant and material to the defense; or

(iv) dismissing the action, with or without prejudice; or

(v) dismissing specified counts of the indictment against the defendant.

Any such order shall permit the Government to avoid the sanction for nondisclosure by agreeing to permit the defendant to disclose the information at the pertinent trial or pretrial proceeding. The Government may exercise its right to take an interlocutory appeal prior to determining whether to permit disclosure of any classified information.

INTERLOCUTORY APPEAL

SEC. 7. (a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case requiring the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General, Deputy Attorney General, or designated Assistant Attorney General certifies to the district court that the appeal is not taken for purposes of delay.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days

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after the decision or order appealed from and the trial or relevant pretrial proceeding shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (i) shall hear argument on such appeal within four days of the adjournment of the trial, (ii) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (iii) shall render its decision within four days of argument on appeal, and (iv) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

INTRODUCTION OF CLASSIFIED INFORMATION

SEC. 8. (a) CLASSIFICATION STATUS.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) PRECAUTIONS BY COURT.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing,

recording, or photograph with excision of some or all of the classified information contained therein.

(c) CONTENTS OF WRITING, RECORDING OR PHOTOGRAPH.—The court may permit proof of the contents of a writing, recording, or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

(d) TAKING OF TESTIMONY.—During the examination of a witness in any criminal proceeding, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and material to the defense. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any classified information. Such action may include requiring the Government to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

SECURITY PROCEDURES TO SAFEGUARD AGAINST COMPROMISE OF CLASSIFIED INFORMATION DISCLOSED TO THE COURT

SEC. 9. (a) Within one hundred twenty days of the date of enactment of this Act, the Chief Justice of the United

States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe security procedures for protection against the compromise of classified information submitted to the Federal district courts, the courts of appeals, and the Supreme Court.

(b) Until such time as procedures are promulgated pursuant to subsection (a), the Federal courts shall in each case involving classified information adopt procedures to protect against the compromise of such information. Such procedures may include, but need not be limited to, those set forth in section 4(a) of this Act.

JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

SEC. 10. (a) Section 3500 of title 18, United States Code, is amended by adding after subsection (c) the following new subsection:

"(d) If the United States claims that any statement ordered to be produced under this section contains classified information, the United States may deliver such statement for the inspection of the court in camera and provide the court with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the court finds (1) that disclosure of any portion of the statement identified by the Government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under

the applicable Executive order, statute, or regulation, and (2) that such portion of the statement is consistent with the witness' testimony, the court shall excise the portion from the statement. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement as well as the affidavit submitted by the United States shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the court of appeals for its examination for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.".

(b) Chapter 223 of title 18, United States Code, is amended as follows:

(1) Present subsections 3500(d) and 3500(e) are redesignated subsections 3500(e) and 3500(f), respectively.

(2) In new subsection 3500(e), following the word "under" replace "subsection (b) or (c)" with "subsection (b), (c), or (d)".

(3) In new subsection 3500(f), following the words "used in" replace "subsection (b), (c), and (d)" with "subsection (b), (c), (d), and (e)".

APPENDIX III

96TH CONGRESS
1ST SESSION

S. 1482

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

IN THE SENATE OF THE UNITED STATES

JULY 11 (legislative day, JUNE 21), 1979

Mr. BIDEN (for himself, Mr. BAYH, Mr. HUDDLESTON, and Mr. KENNEDY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide certain pretrial, trial, and appellate procedures for criminal cases involving classified information.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Classified Information Procedures Act".

DEFINITIONS

SECTION 1. (a) "Classified information", as used in this Act, means any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection

against unauthorized disclosure for reasons of national security and any restricted data, as defined in section 2014(y) of title 42, United States Code.

(b) "National security", as used in this Act, means the national defense and foreign relations of the United States.

PRETRIAL CONFERENCE

SEC. 2. At any time after the filing of the indictment or information, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution. Following such motion, or on its own motion, the court shall promptly hold a pretrial conference to establish the timing of requests for discovery, the provision of notice required by section 5 of this Act, and the initiation of the procedure established by section 6 of this Act. In addition, at the pretrial conference the court may consider any other matters which relate to classified information or which may promote a fair and expeditious trial.

PROTECTIVE ORDERS

SEC. 3. Upon request of the Government, the court shall issue a protective order to guard against the compromise of any classified material disclosed to the defendant.

DISCLOSURE OF CLASSIFIED INFORMATION TO DEFENDANTS

SEC. 4. The court may authorize the Government to delete specified items of classified information from docu-

ments to be made available to the defendant, to substitute a summary of the information for such classified documents, or to substitute a statement admitting relevant facts that the classified information would tend to prove. The Government's motion requesting such authorization and materials submitted in support thereof shall, upon request of the Government, be considered by the court in camera and not disclosed to the defendant.

NOTICE OF DEFENDANT'S INTENTION TO DISCLOSE CLASSIFIED INFORMATION

SEC. 5. (a) NOTICE BY DEFENDANT.—If a defendant reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with any trial or pretrial proceeding involving the criminal prosecution of such defendant, the defendant shall, within the time specified by the court or where no time is specified within thirty days prior to trial, notify the attorney for the Government and the court in writing. Whenever a defendant learns of additional classified information he reasonably expects to disclose at any such proceeding, he shall notify the attorney for the Government and the court in writing as soon as possible thereafter. Such notice shall include a brief description of the classified information. No defendant shall disclose any information known or believed to be classified in connection with a trial or pretrial proceeding until notice has been given

under this subsection and until the Government has been afforded a reasonable opportunity to seek a determination pursuant to the procedure set forth in section 6 of this Act.

(b) FAILURE TO COMPLY.—If the defendant fails to comply with the requirements of subsection (a) the court may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the defendant of any witness with respect to any such information.

PRECEDURE FOR CASES INVOLVING CLASSIFIED INFORMATION

SEC. 6. (a) MOTION FOR HEARING.—After the United States receives notification pursuant to section 5 or otherwise learns of any classified information that the defendant may disclose or cause to be disclosed at a trial or pretrial proceeding, the Government may, within the time specified by the court, move for a hearing concerning any such information. In connection with its motion, the Government may submit the classified information along with an explanation of the basis for the classification to the court for its examination in camera and shall provide the court with an affidavit of the Attorney General, the Deputy Attorney General, or a designated Assistant Attorney General certifying that the information is classified. The hearing, or specified portion thereof, shall be held in camera whenever the Government certifies

that a public proceeding may result in the compromise of classified information.

(b) HEARING.—(1) Prior to the hearing, the Government shall provide the defendant with notice of the information that will be at issue. This notice shall identify the specific classified information that will be at issue whenever that information has previously been made available to the defendant in connection with the pretrial proceedings. The Government may describe the information by generic category rather than identifying the specific information of concern to the Government when the Government has not previously made the information available to the defendant in connection with the pretrial proceedings.

(2) Where the Government moves for a hearing prior to trial, the Government shall upon request of the defendant provide the defendant with a bill of particulars as to the portions of the indictment or information which the defendant identifies as related to the classified information at issue in the hearing. The bill of particulars shall be provided prior to the hearing.

(3) Following a hearing, the court shall determine whether and the manner in which the information at issue may be used in a trial or pretrial proceeding. As to each item of classified information, the court shall set forth in writing the basis for its determination. Where the Government's

motion under subsection (a) is filed prior to the trial or pretrial proceeding, the court shall rule prior to the commencement of the relevant proceeding.

(4)(A) If the court determines that the information may not be disclosed or elicited at a pretrial or trial proceeding the record of the hearing shall be sealed and preserved by the Government in the event of an appeal. The defendant may seek reconsideration of the court's determination prior to or during trial.

(B) In lieu of authorizing disclosure of the specific classified information, the court shall, if it finds that the defendant's right to a fair trial will not be prejudiced, order—

(i) substitution of a statement admitting relevant facts that the specific classified information would tend to prove, or

(ii) substitution of a summary or portion of a specific classified information.

(C) If the court determines that these alternatives to full disclosure may not be used and the Government provides the court with an affidavit of the Attorney General, Deputy Attorney General, or designated Assistant Attorney General objecting to disclosure of the information, the court shall issue any order which is required in the interest of justice. Such an order may include, but need not be limited to an order—

(i) striking or precluding all or part of the testimony of a witness; or

(ii) declaring a mistrial; or

(iii) finding against the Government on any issue as to which the evidence relates; or

(iv) dismissing the action, with or without prejudice; or

(v) dismissing specified counts of the indictment against the defendant.

Any such order shall permit the Government to avoid the sanction for nondisclosure by agreeing to permit the defendant to disclose the information at the pertinent trial or pretrial proceeding. The Government may exercise its right to take an interlocutory appeal prior to determining whether to permit disclosure of any classified information.

(c) RECIPROCITY.—Whenever the court determines pursuant to subsection (b) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interest of fairness do not so require, order the Government to provide the defendant with the information it expects to use to rebut the classified information. The court may place the Government under a continuing duty to disclose such rebuttal information. If the Government fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a

required disclosure and may prohibit the examination by the Government of any witness with respect to such information.

INTERLOCUTORY APPEAL

SEC. 7. (a) An interlocutory appeal by the United States taken before or after the defendant has been placed in jeopardy shall lie to a court of appeals from a decision or order of a district court in a criminal case requiring the disclosure of classified information, imposing sanctions for nondisclosure of classified information, or refusing a protective order sought by the United States to prevent the disclosure of classified information, if the Attorney General, Deputy Attorney General, or designated Assistant Attorney General certifies to the district court that the appeal is not taken for purposes of delay.

(b) An appeal taken pursuant to this section either before or during trial shall be expedited by the court of appeals. Prior to trial, an appeal shall be taken within ten days after the decision or order appealed from and the trial shall not commence until the appeal is resolved. If an appeal is taken during trial, the trial court shall adjourn the trial until the appeal is resolved and the court of appeals (i) shall hear argument on such appeal within four days of the adjournment of the trial, (ii) may dispense with written briefs other than the supporting materials previously submitted to the trial court, (iii) shall render its decision within four days of argu-

ment on appeal, and (iv) may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

INTRODUCTION OF CLASSIFIED INFORMATION

SEC. 8. (a) CLASSIFICATION STATUS.—Writings, recordings, and photographs containing classified information may be admitted into evidence without change in their classification status.

(b) PRECAUTIONS BY COURT.—The court, in order to prevent unnecessary disclosure of classified information involved in any criminal proceeding, may order admission into evidence of only part of a writing, recording, or photograph, or may order admission into evidence of the whole writing, recording, or photograph with excision of some or all of the classified information contained therein.

(c) TAKING OF TESTIMONY.—During the examination of a witness in any criminal proceeding, the Government may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be admissible. Following such an objection, the court shall take such suitable action to determine whether the response is admissible as will safeguard against the compromise of any

classified information. Such action may include requiring the Government to provide the court with a proffer of the witness' response to the question or line of inquiry and requiring the defendant to provide the court with a proffer of the nature of the information he seeks to elicit.

SECURITY PROCEDURES TO SAFEGUARD AGAINST COMPROMISE OF CLASSIFIED INFORMATION DISCLOSED TO THE COURT

SEC. 9. (a) Within one hundred and twenty days following the date of enactment of this Act, the Chief Justice of the United States, in consultation with the Attorney General, the Director of Central Intelligence, and the Secretary of Defense, shall prescribe security procedures for protection against the compromise of classified information submitted to the Federal district courts, the courts of appeals, and the Supreme Court.

(b) Until such time as procedures are promulgated pursuant to subsection (a), the Federal courts shall in each case involving classified information adopt procedures to protect against the compromise of such information.

JENCKS ACT EXCEPTION FOR CLASSIFIED INFORMATION

SEC. 10. (a) Chapter 223 of title 18, United States Code, is amended by adding after subsection 3500(c) the following new subsection:

"(d) If the United States claims that any statement otherwise producible under this section contains classified information, the United States may deliver such statement for the inspection of the court in camera and provide the court with an affidavit from the Attorney General, Deputy Attorney General, or designated Assistant Attorney General identifying the portions of the statement that are classified. If the court finds that any such portion of the statement is consistent with the witness' testimony, the court may substitute a summary for the classified portion or excise the portion from the statement. With such material replaced by a substitution or excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement as well as the affidavit submitted by the United States shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the court of appeals for its examination for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be

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reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.".

(b) Chapter 223 of title 18, United States Code, is amended as follows:

(1) Present subsections 3500(d) and 3500(e) shall be redesignated subsections 3500(e) and 3500(f), respectively.

(2) In new subsection 3500(e), following the word "under" replace "subsection (b) or (c)" with "subsection (b), (c), or (d).".

(3) In new subsection 3500(f), following the words "used in" replace "subsection (b), (c), and (d)" with "subsection (b), (c), (d), and (e).".

IDENTIFICATION OF INFORMATION RELATED TO THE NATIONAL DEFENSE

SEC. 11. In any prosecution in which the Government must establish that material relates to the national defense or constitutes classified information, the Government shall notify the defendant, within the time specified by the court, of the portions of the material that it reasonably expects to rely upon to establish the national defense or classified information element of the offense.

ATTORNEY GENERAL GUIDELINES

SEC. 12. (a) Within one hundred and eighty days of enactment of this law, the Attorney General shall issue guide-

lines specifying the factors to be used by the Department of Justice in rendering a decision whether to prosecute a violation of Federal law in which, in the judgment of the Attorney General, there is a possibility that classified information will be revealed. Such guidelines shall be transmitted to the appropriate committees of Congress.

(b) When the Department of Justice decides not to prosecute a violation of Federal law pursuant to subsection (a), an appropriate official of the Department of Justice shall prepare written findings detailing the reasons for the decision not to prosecute. The findings shall include—

(1) the intelligence information which the Department of Justice officials believe might be disclosed,

(2) the purpose for which the information might be disclosed,

(3) the probability that the information would be disclosed, and

(4) the possible consequences such disclosure would have on the national security.

(c) Consistent with applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the Attorney General shall make available to the Permanent Select Committee on Intelligence of the United States House of Representatives and the Select Committee on Intelligence of the United States

Senate all findings under subsection (b) not later than thirty days after the decision not to prosecute is made.

APPENDIX IV

JENCKS ACT

§ 3500. Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

Added Pub.L. 85–269, Sept. 2, 1957, 71 Stat. 595, and amended Pub.L. 91–452, Title I, § 102, Oct. 15, 1970, 84 Stat. 926.

APPENDIX V

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.1

NOTICE OF ALIBI

(a) Notice by Defendant. Upon written demand of the attorney for the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the attorney for the government a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(b) Disclosure of Information and Witness. Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the attorney for the government shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(c) Continuing Duty to Disclose. If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (a) or (b), the party shall promptly notify the other party or his attorney of the existence and identity of such additional witness.

(d) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

(e) Exceptions. For good cause shown, the court may grant an exception to any of the requirements of subdivisions (a) through (d) of this rule.

(f) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with such intention, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

Added April 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, Pub.L. 94–64, § 3(13), 89 Stat. 372.

Effective Date

Rule effective December 1, 1975, see Order of Supreme Court of April 22, 1975, and Congressional Action on Amendments, set out on page 16.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

Rule 12.2

NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

(a) Defense of Insanity. If a defendant intends to rely upon the defense of insanity at the time of the alleged crime, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, insanity may not be raised as a defense. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the attorney for the government in writing of such intention and file a copy of such notice with the clerk. The court may for cause shown allow late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Psychiatric Examination. In an appropriate case the court may, upon motion of the attorney for the government, order the defendant to submit to a psychiatric examination by a psychiatrist designated for this purpose in the order of the court. No statement made by the accused in the course of any examination provided for by this rule, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding.

(d) Failure to Comply. If there is a failure to give notice when required by subdivision (b) of this rule or to submit to an examination when ordered under subdivision (c) of this rule, the court may exclude the testimony of any expert witness offered by the defendant on the issue of his mental state.

Added April 22, 1974, eff. Dec. 1, 1975; amended July 31, 1975, Pub.L. 94–64, § 3(14), 89 Stat. 373.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

Rule 16.

DISCOVERY AND INSPECTION

(a) Disclosure of Evidence by the Government.

(1) Information Subject to Disclosure.

(A) Statement of Defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of his testimony, so situated as an officer or employee as to have been able legally to bind the defendant in respect to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant in respect to that alleged conduct in which he was involved.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

(B) Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.

(C) Documents and Tangible Objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.

(D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

(3) Grand Jury Transcripts. Except as provided in Rule 6 and subdivision (a)(1)(A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

(b) Disclosure of Evidence by the Defendant.

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.

(2) Information Not Subject to Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

(c) Continuing Duty to Disclose. If, prior to or during trial, a party discovers additional evidence or material previously requested or ordered, which is subject to discovery or inspection under this rule, he shall promptly notify the other party or his attorney or the court of the existence of the additional evidence or material.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

(d) **Regulation of Discovery.**

(1) **Protective and Modifying Orders.** Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(2) **Failure to Comply with a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

(e) **Alibi Witnesses.** Discovery of alibi witnesses is governed by Rule 12.1.

Amended Feb. 28, 1966, eff. July 1, 1966; April 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94–64, § 3(20)–(28), 89 Stat. 374, 375; Dec. 12, 1975, Pub.L. 94–149, § 5, 89 Stat. 806.

1966 Amendment

Reworded and greatly expanded this rule. Prior thereto the rule read: "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

1975 Amendments

Pub.L. 94–149 struck out paragraph (4) of subdivision (a) and paragraph (3) of subdivision (b) which paragraphs related to failure to call a witness.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

Rule 16 RULES OF CRIMINAL PROCEDURE

Pub.L. 94-64 revised rule generally to give greater discovery to both the prosecution and the defense, incorporating some of the provisions of former subdivisions (a), (b), (c), (d), (e), and (g) into new subdivisions (a), (b), (c), and (d), adding a new subdivision (e) covering discovery of alibi witnesses, and dropping the provisions of former subdivision (f) dealing with time of motions, which provisions were transferred to rule 12.

Effective Date of 1975 Amendment

Amendment of Rule effective December 1, 1975, see Order of Supreme Court of April 22, 1974, and Congressional Action on Amendments, set out on page 16.

Rule 17.1

PRETRIAL CONFERENCE

At any time after the filing of the indictment or information the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial. At the conclusion of a conference the court shall prepare and file a memorandum of the matters agreed upon. No admissions made by the defendant or his attorney at the conference shall be used against the defendant unless the admissions are reduced to writing and signed by the defendant and his attorney. This rule shall not be invoked in the case of a defendant who is not represented by counsel. Added Feb. 28, 1966, eff. July 1, 1966.

Judicial Constructions and Advisory Committee Notes, see Title 18 U.S.C.A.

FEDERAL RULES OF EVIDENCE

Rule 106.

REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Rule 401.

DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402.

RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Judicial Constructions and Advisory Committee Notes, see Title 28 U.S.C.A.

FEDERAL RULES OF EVIDENCE

Rule 412

RAPE CASES; RELEVANCE OF VICTIM'S PAST BEHAVIOR

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, reputation or opinion evidence of the past sexual behavior of an alleged victim of such rape or assault is not admissible.

(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of rape or of assault with intent to commit rape, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is—

(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

(2) admitted in accordance with subbdivision (c) and is evidence of—

(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which rape or assault is alleged.

(c)(1) If the person accused of committing rape or assault with intent to commit rape intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

(d) For purposes of this rule, the term "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which rape or assault with intent to commit rape is alleged.

Added Pub.L. 95–540, § 2(a), Oct. 28, 1978, 92 Stat. 2046.

FEDERAL RULES OF EVIDENCE

Rule 1002.

REQUIREMENT OF ORIGINAL

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.